INSTRUCTIONS OF THE SEVENTH CIRCUIT (2012); EIGHTH CIRCUIT MODEL JURY INSTRUCTIONS (2021); MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT (2022); CRIMINAL PATTERN JURY INSTRUCTIONS FOR THE TENTH CIRCUIT (2021); ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS, CRIMINAL CASES (2022). Combined, the published federal circuit model jury instructions use 'around the time' in zero instructions, but use 'at the time' in 502 instructions. This Circuit should not endorse such unprecedented and vague language absent clear guidance from Congress.

C. Defendant Objected To These Instructions Below

In the court below, the Defense objected that "the word 'affiliation' does not adequately capture the language of the statute, which requires on a plain reading that the defendant actually be an 'Indian' rather than merely be affiliated with Indian tribes." R. at 18. This apprised Judge Silverstein that his use of 'affiliated with' was improper.

The Defense also urged Judge Silverstein to replace the second prong of his instructions with one that asks whether the defendant "*is* enrolled with a federally recognized tribe." R. at 18 (emphasis added). This proposed instruction put Judge Silverstein on notice that the Defense objected to his use of 'around the time.'

Even the Prosecution "urge[d] the court to adjust its jury instructions to conform more closely with those found in the Ninth Circuit's Manual of Model Criminal Jury Instructions and endorsed in United States v. Zepeda." R. at 17. The Ninth Circuit's Model Criminal Jury Instructions require the defendant to be a member of a federally recognized tribe "at the time of the offense." MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 543 (2022). This too put Judge Silverstein on notice that 'around the time' was an improper instruction.

Judge Silverstein was thus "apprised" of the parties' objections with 'affiliated with' and 'at or around the time.' LeBlanc, 612 F.2d at 1014. Therefore, this Court reviews the accuracy of the jury instructions de novo. Hendrickson, 822 F.3d at 818.

D. Harmless Error

To avoid reversal, the Government must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Baldwin, 418 F.3d at 582.

However, at the time of the offense, Wood was not enrolled in, or a member of, a federally recognized tribe. R. at 35. At the time of the offense, Wood was not recognized as an Indian by the tribe or by the federal government. Baldwin, 418 F.3d at 582. At the time of the offense, Wood did not enjoy government benefits because of an affiliation with a federally recognized tribe. Id. At the time of the offense, Wood did not live on the reservation. Id. At the time of the offense, Wood was "not entitled to share any subsequent rights of membership." R. at 25.

It may be true that *around* the time of the offense, Wood was *affiliated* with a federally recognized tribe. R. at 35. But given this case's undisputed facts, it is quite likely that the error in Judge Silverstein's instructions "contribute[d] to the verdict obtained." Baldwin, 418 F.3d at 582.

V. CONCLUSION

In the absence of relevant Sixth Circuit precedent, the district court judge presented the jury with a set of jury instructions never used and untested by any court. These jury instructions violated the Equal Protection Clause by asking the jury to determine whether Wood was of the Indian race, rather than of Indian political status. Additionally, the jury instructions ran afoul of the plain text of the statute and were impermissibly vague.

The integrity of the judicial system requires that the Defendant receive a new trial. We strongly urge the judge to reverse.

Applicant Details

First Name	**Sarah**
Last Name	**Al-Shalash**
Citizenship Status	**U. S. Citizen**
Email Address	**sa3992@columbia.edu**
Address	**Address** Street **419 W 119th Street, 8C1** City **New York** State/Territory **New York** Zip **10027** Country **United States**
Contact Phone Number	**2144712150**
Other Phone Number	**2144712150**

Applicant Education

BA/BS From	**Yale University**
Date of BA/BS	**May 2019**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 15, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Science and Technology Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Emens, Elizabeth
eemens@law.columbia.edu
212-854-8879

Greene, Jamal
jamal.greene@law.columbia.edu
212-854-5865

Richman, Dan
drichm@law.columbia.edu
212-854-9370

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Sarah Al-Shalash
419 W 119th Street, 8C1
New York, NY 10027
214-471-2150

June 12, 2023

The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a rising third-year student, a James Kent Scholar, and a Public Interest/Public Service Fellow at Columbia Law School. I am also the Executive Articles Editor of the *Science and Technology Law Review*. I write to apply for a clerkship in your chambers beginning in 2024, or for any term thereafter. As a student committed to a career in service of the public interest, I hope to use my clerkship to become a more effective advocate for the communities I serve. I believe your mentorship will allow me to do just that.

I also believe I would excel as your clerk. I have long enjoyed legal research and writing, and I've honed that enjoyment into a skill as a legal research assistant, a litigation intern at the ACLU, and a member of the *Science and Technology Law Review*. I take pride in being a warm and collaborative colleague, a trait that I found universally useful in my professional life prior to law school. I am disciplined, attentive, and ever-curious. I hope to bring these qualities to bear in my work in your chambers.

Enclosed please find a resume, transcript, and writing sample. Also enclosed are letters of recommendation from Professor Jamal Greene (jamal.greene@law.columbia.edu), Professor Elizabeth Emens (eemens@law.columbia.edu), and Professor Daniel Richman (drichm@law.columbia.edu). Thank you for your time and consideration of my candidacy.

Respectfully,

Sarah Al-Shalash

SARAH AL-SHALASH

419 West 119th Street, Apt. 8C1, New York, NY 10027
214-471-2150 • sarah.al-shalash@columbia.edu

EDUCATION

COLUMBIA LAW SCHOOL, New York, NY
J.D., expected May 2024
Honors: Public Interest/Public Sector Fellow, James Kent Scholar, Harlan Fiske Stone Scholar
Activities: Columbia Science and Technology Law Review (Executive Articles Editor), CLS Legal Tech Association (Public Interest Events Chair), Academic Coach, Research Assistant to Professor Elizabeth Emens, Research Assistant to Professor Jamal Greene, Teaching Assistant to Professor Thomas Merrill, Human Rights Institute 1L Advocates Program.

YALE UNIVERSITY, New Haven, CT
B.A., in Ethics, Politics, and Economics, received May 2019
Honors: Class of 2019 Commencement Marshall
Activities: The Yale Politic Magazine; Fifth Humour Sketch Comedy group; Worked approximately 20 hours per week to finance education

EXPERIENCE

American Civil Liberties Union — New York, NY
Speech, Privacy, and Technology Team Internship — May 2023 – August 2023

Knight First Amendment Institute — New York, NY
Litigation Extern — August 2022 – December 2022
Research Assistant, Press Freedom Project — January 2022 – April 2022
Supported innovative litigation efforts about issues related to digital rights and the First Amendment, such as: the use of spyware by powerful officials, Texas and Florida laws targeting social media sites, and surveillance of journalists.

Electronic Privacy Information Center (EPIC) — Washington, DC
Internet Public Interest Opportunities Program Clerkship — May 2022 – August 2022
Performed tasks focused on privacy in the digital age. Drafted legal memoranda regarding Federal Trade Commission (FTC) complaints, wrote model amicus brief about Section 230 immunity, drafted Freedom of Information Act (FOIA) request regarding surveillance of individuals in prisons, supported legislative efforts regarding the American Data Privacy and Protection Act (ADDPA).

Deloitte Government & Public Service — Washington, DC
Consultant — October 2019 – August 2021
Supported a number of projects at the intersection of technology and the public interest. Completed internal projects with Deloitte's Trustworthy and Ethical Technology team and Deloitte's 5G team.

LANGUAGES: Arabic (heritage speaker); French (fluent)

Columbia Law School

Registration Services

law.columbia.edu/registration
435 West 116th Street, Box A-25
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T 212 854 2668
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CLS TRANSCRIPT (Unofficial)

06/08/2023 16:59:29

Program: Juris Doctor

Sarah Al-Shalash

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6407-1	Advanced Constitutional Law: 1st Amendment	Healy, Thomas Joseph	3.0	A
L6905-1	Antidiscrimination Law	Johnson, Olatunde C.A.	3.0	B+
L6472-1	S. Special Topics in Federal Courts	Schmidt, Thomas P.	2.0	A
L6683-1	Supervised Research Paper	Richman, Daniel	2.0	A
L6822-1	Teaching Fellows	Merrill, Thomas W.	4.0	CR

Total Registered Points: 14.0

Total Earned Points: 14.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-2	Evidence	Capra, Daniel	4.0	A
L6299-1	Ex. The Knight First Amendment Institute	DeCell, Caroline; Diakun, Anna	2.0	A
L6299-2	Ex. The Knight First Amendment Institute - Fieldwork	DeCell, Caroline; Diakun, Anna	3.0	CR
L6425-1	Federal Courts	Metzger, Gillian	4.0	A-
L6675-1	Major Writing Credit	Richman, Daniel	0.0	CR
L6685-1	Serv-Unpaid Faculty Research Assistant	Emens, Elizabeth F.	2.0	A
L6683-1	Supervised Research Paper	Richman, Daniel	1.0	A

Total Registered Points: 16.0

Total Earned Points: 16.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6108-4	Criminal Law	Seo, Sarah A.	3.0	B+
L6679-1	Foundation Year Moot Court		0.0	CR
L6474-1	Law of the Political Process	Greene, Jamal	3.0	A-
L6121-11	Legal Practice Workshop II	Harwood, Christopher B	1.0	P
L6116-4	Property	Merrill, Thomas W.	4.0	A-
L6118-2	Torts	Rapaczynski, Andrzej	4.0	A

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-7	Legal Methods II: Contemporary Issues in Constitutional Law	Liu, Goodwin	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-2	Civil Procedure	Genty, Philip M.	4.0	B+
L6133-1	Constitutional Law	Greene, Jamal	4.0	B+
L6105-4	Contracts	Emens, Elizabeth F.	4.0	A-
L6113-2	Legal Methods	Briffault, Richard	1.0	CR
L6115-11	Legal Practice Workshop I	Harwood, Christopher B; Hong, Eunice	2.0	P

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 61.0

Total Earned JD Program Points: 61.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2022-23	James Kent Scholar	2L
2021-22	Harlan Fiske Stone	1L

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Ms. Sarah Al-Shalash for a clerkship in your chambers. Ms. Al-Shalash is a very smart, engaging, and thoughtful law student, who I expect will be a terrific clerk.

I know Ms. Al-Shalash in two ways: as a student in my Contracts class in Fall 2021 and as my Research Assistant during the Summer through Fall of 2022. I therefore have a strong basis on which to comment on her performance and prospects.

My introduction to Ms. Al-Shalash came through first-year Contracts in the Fall of 2021. The grades in that course were based primarily on a difficult anonymously graded exam, which combined multiple-choice questions and essays. Students were required to write two essays: one analyzing traditional legal problems in order to predict how a court would decide them, and a second evaluating the conceptual underpinnings of contract law and applying them to specific doctrines. The exam also required students to apply their knowledge of doctrine to solve problems on a set of challenging multiple-choice questions. Ms. Al-Shalash did a fine job on all three portions of the exam, and she earned an "A-" in the course. She was also a thoughtful class participant, memorably so.

Based on her terrific performance in Contracts, I invited Ms. Al-Shalash to become my Research Assistant (RA) beginning in the Summer of 2022. My RAs submit written memos to me, and they also present their findings to each other and to me in periodic RA Briefing Meetings. Ms. Al-Shalash conducted interdisciplinary research on widely varying topics related generally to gender and disability discrimination. She wrote strong memos on these topics and presented her work effectively in the Briefing Meetings. She earned an "A" in this position.

Ms. Al-Shalash has had an impressive law-school career so far, both inside and outside the classroom. She earned Harlan Fiske Stone Honors for her academic performance during her 1L year, and, because of her demonstrated commitment to pursuing a career in civil/human rights law and technology, she is a Public Interest/Public Service Fellow at the Law School. She is currently Executive Articles Editor for the *Columbia Science and Technology Review*, overseeing a team of nearly forty Articles Editors and Staff Editors and serving as the key liaison between the journal and the authors. She has served as the Public Interest Event Planning Chair for the Columbia Legal Technology Association; a CLS Peer Mentor; a Clerkship Diversity Initiative Scholar; and a member of the 1L Human Rights Advocates Program. Many of these activities involve mentoring others, which is a lifelong passion of hers.

She has sought out research and teaching opportunities during her first two years at Columbia, externing with the Knight First Amendment Institute, which is an appellate litigation public interest organization focused on protecting civil liberties in the digital age, and serving as a Research Assistant to Professor Jamal Greene as well as to me. She has served as a Teaching Assistant for Property and as an Academic Coach for several students in the subject of Contract Law.

During her summers, Ms. Al-Shalash has been gaining experience that builds on her already strong skill set. She spent her 1L summer at the Electronic Privacy Information Center, where she worked on amicus briefs regarding Section 230 liability and supported advocacy efforts for federal privacy legislation. Currently, Ms. Al-Shalash is working at the ACLU Speech, Privacy and Technology Project.

Before law school, Ms. Al-Shalash worked for two years as a Consultant in Deloitte's Public Sector practice. In this role, she served a variety of public sector clients, including the Department of Defense and Nadia's Initiative (a non-profit begun by Nobel Peace Prize Winner Nadia Murad). This role required her to work in a fast-paced environment, to collaborate with across teams and with clients, to adjust to new settings quickly, and to be extremely attentive to detail. Ms. Al-Shalash's interest in the law long predates that job, however; at sixteen, she was listening to Supreme Court oral arguments in her spare time.

On a personal note, I might add two points. First, her commitment to public service work comes from her experience growing up in an Iraqi family, a Muslim girl in a conservative Texas town. Second, before law school, Ms. Al-Shalash was a comedic performer; this was her main extracurricular activity in high school and college. This taught her about taking risks and integrating others' responses into her performance, which has helped her become someone who takes feedback in stride.

In sum, Ms. Al-Shalash is a smart, talented, and engaging law student deeply committed to public service. I believe she will be a terrific clerk, and I strongly recommend her to you.

Let me know if I can provide any other information. I would be happy to speak further. I am out of the office this Summer, but recommendations are a priority, and I can generally be reached through my assistant, Kiana Taghavi (ktaghavi@law.columbia.edu), or on my cell phone at 718-578-9469.

Sincerely,

Elizabeth Emens - eemens@law.columbia.edu - 212-854-8879

Elizabeth F. Emens

Elizabeth Emens - eemens@law.columbia.edu - 212-854-8879

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in support of Sarah Al-Shalash's application to clerk in your chambers. Having gotten to know Sarah as her professor for two classes and in her capacity as my research assistant, I would cheerfully hire her myself if I were a judge. I hope to persuade you to hold her in similarly high esteem.

To put first things first, Sarah is an excellent law student. It shows in her grades, but they understate her legal ability. I first came to know Sarah in her first semester of law school, when she was a student in my 33-student Constitutional Law "small group." The "small group" experience allows a professor to become well acquainted with the class—everyone in the class was on call many times over the course of the semester, class participation was encouraged even for students who were not on call, and office hours were lively, often continuing topics raised in class with most of the class members present. I find a class of this size especially valuable for Constitutional Law, a course whose subject matter can expose students to vulnerabilities that are easier for them to experience—and for the professor to manage—in a more intimate setting. Sarah excelled in this environment. She was always well-prepared, was deeply curious, and was respectful of others. She was also remarkably self-possessed, exuding an intellectual maturity that one does not always encounter in first-year law students. I genuinely looked forward to her interventions, which I came over the course of the semester to recognize as the product of a preternaturally thoughtful mind.

The downside of a small group is that the class size typically produces an unusual number of excellent exams, which makes the grading curve especially unforgiving of strong performers who miss a random point here or there on the final. Sarah produced the 11th highest exam score, but this was good for just a B+: only the top 10 scores could receive A-level grades. Her exam was a strong one by any reasonable measure.

In her second semester of law school, Sarah enrolled in my 126-student Law of the Political Process class. Law of the Political Process is a theoretically rigorous election law class that immerses students in the constitutional and statutory doctrine around voting rights, rights of political association, districting and gerrymandering, and campaign finance. The course was extremely demanding. It required advanced competence in constitutional law, comfort with interpretation of several complex statutes, an ability to navigate confusing and self-contradictory case law with Byzantine factual records, and the agility to move back and forth between the highly conceptual and the highly specific. Students reported the workload as unusually heavy for a three-credit course. The course attracts highly motivated students, many of whom have already done related advanced coursework and a surprising number of whom have previous professional experiences in election-related settings. For these reasons, the course has in the past been limited to upperclass students —the year Sarah took the course was the first time 1L students were permitted to enroll. Despite being a 1L, Sarah was again a high performer, submitting a top-25 exam out of the 126 students in the course.

Impressed by her legal acumen, her maturity, and her demeanor, I asked Sarah if she might be interested in serving as a research assistant for me in the fall of 2022 to provide support for an ongoing book project. She agreed, and I gave her two of the more difficult assignments I have given any RA in recent years. The first project required her to research the empirical relationship between women's access to reproductive care in the 1960s and 1970s and their levels of civic participation; the second required her to scour the legislative record to see the how members of Congress defended the constitutionality of the Civil Rights Act of 1875 over the several years in which aspects of the law were being debated. For the latter project, Sarah was almost entirely self-directed, structured her own time and organization of the research, and produced a 92-page research memo that will supply material crucial to the book project. I had high expectations for what Sarah would produce as a research assistant, and she far exceeded them.

Purely in terms of the work of a judicial clerk—the legal analysis, the bench memos, the draft opinions and orders, the reliability and maturity—Sarah is a high-upside, low-risk candidate. But those are not the only reasons to give her your highest consideration. Sarah also would bring to chambers a diverse set of life experiences, acquired at significant personal cost to her. Sarah was born in Texas to two Iraqi immigrants. After a three-year move to Versailles, where her father pursued work as an engineer, Sarah's family returned to Texas, where she spent most of her childhood. What might have been an idyllic middle-class life in the Dallas suburbs for some was a whirlwind of Islamophobia, racism and xenophobia for a Muslim family that had spent three years living in France. Sarah overcame insults and hostility to become a star student and debater before heading to Yale for college. There she experienced another culture shock, this time based in class, and again had to overcome cultural alienation—leaving home, which women in her community rarely did before marriage, had strained her relationship with her family.

It would be understandable for someone to become withdrawn and embittered by these experiences, but Sarah has drawn strength from adversity. She embraces challenges—whether it's the Great Books course at Yale or Law of the Political Process at Columbia—she is a voracious consumer of legal writing, and she has genuine personal and professional commitments, in her case to decoupling the relationship between technology and power. She's also a delightful—and very funny—person (she was a comedic performer from age 14 to 22, and directed a sketch comedy group in college). As I said, if I were a judge, Sarah would be a top choice. She should be one for you too.

Jamal Greene - jamal.greene@law.columbia.edu - 212-854-5865

Thank you for your kind consideration. Please do not hesitate to reach out if I can be of additional assistance.

Sincerely,

Jamal Greene
Dwight Professor of Law

COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Sarah Al-Shalash

Dear Judge Walker:

I write to enthusiastically support the application of Sarah Al-Shalash – a rising 3L at Columbia Law School, Class of 2024 -- to be your law clerk. She is whip smart, writes beautifully, and would doubtlessly do extraordinary work in your chambers. She's also a delightful and inspiring person.

I first met Sarah during her 1L year, when I was assigned to be her mentor as part of the Public Interest/Public Service Fellows Program. She had been selected for that program, in part, because of her undergraduate work at Yale, and the work she did before law school for Deloitte – as a public sector consultant working with, among other clients, Space Force(!) – and at the State Department. As she has explained to me:

When I began my undergrad career, I was interested in international relations.
Specifically, I was interested in the Middle East, and the role of the West in Middle Eastern conflict. I thought I would work for a non-profit or in an aid organization.

In pursuit of this goal, I applied for an internship at the State Department. I wanted to
work for an embassy in the Middle East. Unfortunately, I was waitlisted for the positions I was most interested in. Instead, I was offered a position at one of the bureaus in DC. This bureau was relatively new, and very modern. They were working on issues of technology in international relations. My internship was the summer of 2017, and the 2016 election loomed large then. Most of my work focused on disinformation and misinformation, and I fell in love with the issues at the edge of this new horizon.

Sarah has gone to work with organizations grappling with the hardest digital privacy issues – EPIC, the Knight Institute, and (this summer) the ACLU. And she used her 2L Note for the Science and Technology Law Review for just such an issue, under my supervision. She chose quite a challenging topic: does the Fourth Amendment restrict reverse keyword searches by the Government, and, if not, what other doctrinal resources might be available. The topic was challenging for several reasons. To begin, just finding judicial discussions of the issue was hard. Although there is good evidence that law enforcement agencies are using subpoenas (not warrants) to obtain this information, judicial analyses are sparse. Sarah rose to that challenge by looking to not just the limited cases precisely on point but to the growing number of cases involving geofence warrants – another reverse search, whose analysis offers some analogies. But the real challenge for Sarah, given her commitments to privacy protections, was facing up to the limits of the Fourth Amendment in the area, and recognizing that even current First Amendment doctrine would offer little help. Sarah rose to this challenge as well, never letting her ideological preferences get in the way of cold case law analysis and always aware of the limits of constitutional protection.

Sarah was an utter pleasure to work with. She can write quickly and powerfully, and is deft indeed at case law analysis. Moreover, it was a pleasure to work with her, as she responds to criticism speedily and effectively.

Sarah's grades are quite good, particularly after her first semester 1L year. I often find that students who have not gone directly from college don't immediately take to law school exams. But she now seems to be firing on all cylinders.

Only when I pushed Sarah for her personal backstory did I realize the extent of her personal accomplishment and strength of character. She grew up in Plano, Texas, the daughter of Iraqi immigrants (her dad escaped Iraq on foot to avoid conscription into the Iraqi army during the 1990 Gulf War). Her time in the Dallas area was often painful:

I watched my teachers and classmates cheer on the war in Iraq as my mother fielded phone calls from back home, telling her that her family members had been brutally murdered on the streets of Baghdad. Everyone around me seemed to accept that my culture and my religion was something to be feared and denounced. My entire childhood, I experienced strong Islamophobia and anti-Arab prejudice.

The experience led her to work hard, in hopes of going to college outside of Texas. But her acceptance to Yale led to only more difficulties, as her parents refused to let her leave home, and ended up cutting her off financially. Attending Yale without the money to buy required books was a life-changing experience:

For better or for worse, that experience taught me a lot. It taught me how to be gritty, and how to work hard even when it feels like the odds are stacked against you. I took a full course load, worked 2-3 student jobs per semester, and ran several student organizations. In the summer, I always took one "resume" job (an internship that would be relevant to my career), and 3-4 "real"

jobs (jobs that I knew would give me the reserves for another year of school). Eventually, this all became second nature to me, and the struggles I felt so acutely in my first few years of school began to feel manageable.

Against this backdrop, Sarah's law school performance and the professional path she has charted are indeed a triumph.

I think you'd like Sarah a lot and am confident she'd be a spectacular law clerk. Her commitment to public interest work, top-notch intellect, and proven record of sustained and excellent writing would enrich any Chamber. Both in print and in person, she expresses herself clearly and with tight analytical lines. She's also a lovely person – calm, mature, with a wonderful sense of humor (she ran a sketch comedy group at Yale) and real leadership skills (she was a Yale Commencement Marshal). You'll love working with her and watching her soar thereafter when she continues her public interest work. If there is anything else I can add, please give me a call.

Respectfully yours,

Daniel Richman

Dan Richman - drichm@law.columbia.edu - 212-854-9370

SARAH AL-SHALASH
Columbia Law School J.D. '24
214-417-2150
sarah.al-shalash@columbia.edu

CLERKSHIP APPLICATION WRITING SAMPLE

The writing sample below is an excerpt from my student Note: *Finding A Needle In A Haystack: Reverse Keyword Searches, Speech, And Privacy*. The Note discusses the advent of reverse keyword searches, a novel investigative method by which law enforcement can compel Google and other online search providers to divulge the information of any and all users who searched for a particular set of terms; if they believe these searches will reveal the perpetrator of or witnesses to a particular crime. The Note makes two claims: First, that existing Fourth Amendment doctrine does not protect against these forms of search, and that this lack of protection should be cause for concern. Second, that the First Amendment can and should provide a buttress against law enforcement uses of reverse keyword searches.

The excerpt below touches on the first point: that the Fourth Amendment is likely to be insufficiently protective of the civil liberties interests implicated by these investigative methods. Only one case thus far has litigated the constitutionality of reverse keyword searches. Therefore, in order to predict the constitutional analysis that will be applied to future challenges to reverse keyword searches, I rely heavily on another, similar form of search—the geofence search. A geofence search is a similar law enforcement investigative tool which allows police to compel companies like Google to turn over the information of individuals who were recorded as being in or near a particular place during the time at which a crime occurred.

This Note benefited from substantive feedback from my Note Advisor, Professor Daniel Richman.

PART II: APPLYING THE FOURTH AMENDMENT TO REVERSE SEARCH WARRANTS

a. Introduction

Very little litigation about reverse keyword searches has been undertaken.[1] This part of the Note attempts to fill this gap in the literature by assessing the current state of Fourth Amendment doctrine, particularly with respect to reverse searches, and using that information to determine how courts might apply that doctrine to reverse keyword search warrants. Because of the dearth of reverse keyword search cases, this analysis will rely heavily on the existing case law regarding geofence warrants, the reverse keyword search warrant's closest analog.

Like reverse keyword searches, geofence warrants allow law enforcement to commandeer the databases of big technology companies like Google. With one warrant, law enforcement can access millions of data points—and potential suspects. Like reverse keyword searches, geofence warrants are undertaken in order to identify a suspect, rather than with a suspect in mind. Like reverse keyword searches, the information obtained in geofence warrants is "voluntarily" given to Google when individuals use the technology company's services and implicitly or explicitly "agree" to collection of their information.[2]

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[1] *People v. Seymour* is the only publicly available challenge to information obtained through a reverse keyword search warrant. Motion to Suppress Evidence from a Keyword Warrant & Request for a Veracity Hearing at ¶ 2, *People v. Seymour*, No. 21CR20001 (Colo. 2022) ("No court has considered the legality of a reverse keyword search").

[2] Whether this data-sharing can be accurately described as "voluntarily given" is heavily contested, and a question that this Note attempts to grapple with. See Part II.C.ii, *infra*. Many observers of the modern data-economy argue that even where individuals know their information is being collected and stored, and even where they affirmatively accept such practices, they are nonetheless not providing "meaningful consent." *See, e.g.,* Neil Richards, Woodrow Hartzog*, Privacy's Trust Gap: A Review Obfuscation: A User's Guide for Privacy and Protest by Finn Brunton and Helen Nissenbaum Cambridge and London: The Mit Press, 2015,* 126 YALE L.J. 1180 (2017) ("Thinking of privacy as an issue of personal choice, preferences, and responsibility has powerful appeal.[…] Yet there is a problem with this view of the digital world…[t]he digital consumer is not like the classic American myth of the cowboy, a rugged and resilient island of autonomy set against the backdrop of the digital frontier.[…] In the digital world, we may heap responsibility on individual users of technology, but they lack options for protecting themselves.").

This section will cover (i) how warrant requirements and third-party doctrine have been applied to geofence warrants, (ii) what key differences might nonetheless make the geofence analysis inapplicable to reverse keyword searches, (iii) how reverse keyword search warrants might be analyzed under existing Fourth Amendment doctrine, and (iv) how the good faith exception may apply in the context of reverse keyword search warrants. Ultimately, the analysis suggests that the Fourth Amendment is an insufficiently protective or certain guardrail on government intrusions of this nature.

b. Geofence Warrants and the Fourth Amendment

In total, geofence warrants have been challenged a total of eleven times in the lower federal courts, to mixed results—although on balance most applications have either been granted or upheld under the good faith exception.[3] On these eleven challenges, three decisions have denied the legality of the warrant, five have upheld the legality of these warrants, and three have upheld the use of the evidence from the warrant under the good faith exception.[4] This inconsistency in the lower courts is evidence of the deep uncertainty that current Fourth Amendment doctrine has

[3] The legality of geofence warrants is at issue in eleven publicly reported federal cases: *Matter of Search of Info. Stored at Premises Controlled by Google, as further described in Attachment A*, No. 20 M 297, 2020 WL 5491763 (N.D. Ill. 2020) (geofence warrant application denied); *Matter of Search of Info. Stored at Premises Controlled by Google*, 481 F. Supp. 3d 730 (N.D. Ill. 2020) (geofence warrant application denied); *Matter of Search Warrant Application for Geofence Location Data Stored at Google Concerning an Arson Investigation*, 497 F. Supp. 3d 345 (N.D. Ill. 2020) (geofence application granted); *Matter of Search of Info. that is Stored at Premises Controlled by Google, LLC*, 542 F. Supp. 3d 1153 (D. Kan. 2021) (geofence application denied); *Matter of Search of Info. that is Stored at Premises Controlled by Google LLC*, 579 F. Supp. 3d 62 (D.D.C. 2021) (geofence warrant application granted); *United States v. Chatrie*, 590 F. Supp. 3d 901 (E.D. Va. 2022) (finding the geofence warrant was improperly issued but upholding the use of evidence under the good faith exception); United States v. Davis, 2022 WL 3007744 (M.D. Ala. July 28, 2022) (upholding the legality of the geofence warrant); *United States v. Cruz, Jr.*, No. 22-cr-0064 (D.D.C. 2023) (evidence from geofence warrant upheld because it was properly issued, else the good faith exception applied); *U.S. v. Rhine*, No. CR 21-0687 (RC), 2023 WL 372044 (D.D.C. 2023) (denying motion to suppress evidence obtained by a geofence warrant); *United States v. Smith*, No. 3:21-CR-107-SA, 2023 WL 1930747 (N.D. Miss. 2023) (finding law enforcement failed to comply with the narrowing requirement of the warrant, but upholding evidence on basis of the good faith exception); *Matter of Search of Info. Stored at Premises Controlled by Google*, 2023 WL 2236493 (S.D. Tex. 2023) (upholding the legality of the geofence warrant).

[4] *Id*.

engendered, an uncertainty driven in no small part by the rapidly changing technological landscape.[5]

State courts are another important site of contestation for geofence warrants. Here too, the evidence (such that it exists) about the court's response is mixed. In the six cases that were publicly available, state courts upheld the use of geofence warrants in three of them.[6] In one of these cases, the court found that the geofence warrant had been improperly issued, but that it was subject to the good faith exception.[7] In the remaining three cases, state courts rejected the use of geofence warrants.[8] In one of those cases, the court found that the geofence warrant had been improperly issued, that the good faith exception applied, but that notwithstanding the good faith exception the warrant was required to be excluded under California statutory law.[9]

As this catalog of publicly-available geofence cases reveals, existing doctrine about the legality of these investigative tools is best described as uncertain. Nevertheless, geofence warrants are an important analog to the reverse keyword search warrant case.

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[5] For more on the uncertainty regarding the scope of the Fourth Amendment engendered by recent decisions like *Carpenter v. US*, see: Matthew Tokson, *The Aftermath of Carpenter: An Empirical Study of Fourth Amendment Law*, 2018-2021, 135 Harv. L. Rev. 1790, 1800 n. 64 and 65 (2022).

[6] An EFF investigation suggests that a California lower court denied a suppression motion in the *People v. Meza*. Jennifer Lynch, *EFF Files Amicus Briefs in Two Important Geofence Search Warrant Cases*, EFF (Jan. 31, 2023) (https://tinyurl.com/2s3eb5kv); In re: Motion to Suppress Geofence Evidence, *Arizona v. Batain*, 2022 Az. Superior Court (Pima County, 2022) (upholding geofence on the basis of the good faith exception) (https://tinyurl.com/2p8er85a). Reporting indicates that a geofence was permitted by a Jefferson Circuit Judge in Louisville, Kentucky for in a murder investigation of the death of Tyree Smith. Jacob Ryan, *To Solve Murders, Louisville Police Turn to Techy 'Geofence' Warrants—But Net Few Arrests*, LEO WEEKLY (Oct. 22, 2021) (https://tinyurl.com/2s4bkkrw).

[7] In re: Motion to Suppress Geofence Evidence, *Arizona v. Batain*, 2022 Az. Superior Court (Pima County, 2022).

[8] *See In re Info. Stored at the Premises Controlled by Google*, 2022 Va. Cir. (Fairfax Co. Feb. 24, 2022) (finding that a proposed geofence warrant was impermissible under the federal constitution because it was lacked particularity and probable cause); Order Granting Motion to Suppress, *People v. Dawes*, No. 19002022 (CA Super. Ct. San Francisco 2022) (finding the geofence warrant prohibited, regardless of its constitutionality, because of CalEPCA, a California statute); Memorandum of Decision and Order on Defendant's Motion to Suppress Search Warrant, *Commonwealth v. Fleischmann*, 2021 Ma. Sup. (https://tinyurl.com/59zcxwa2).

[9] Order Granting Motion to Suppress, *People v. Dawes*, No. 19002022 (CA Super. Ct. San Francisco 2022).

i. Geofence Warrants and the Third-Party Doctrine

Courts, and Google, have largely treated geofence warrants as covered by the Fourth Amendment, suggesting that they believe that *Carpenter* applies to this form of search.[10] This development may suggest that reverse keyword searches will also fall under the Fourth Amendment's protections. But there is reason to remain concerned about the Fourth Amendment's scope in this area: Courts have generally "presumed, without deciding" that *Carpenter* covers geofence warrants.[11] This language suggests that the uncertainty of *Carpenter* has been weakly papered-over by the courts, rather than resolved decisively in favor of finding reverse searches to be Fourth Amendment searches.

ii. Geofence Warrants and the Probable Cause Requirement

In the context of geofence searches, the probable cause requirement has proven flimsy. In these cases, the courts have required that (1) there is a fair probability that a crime has been committed, and (2) a fair probability that the evidence of a crime will be in the particular place to be searched (typically Google's databases).[12] Generally, the first prong of the test is easily met:

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[10] Google maintains that geofence searches require a warrant under the SCA and the Fourth Amendment, and lower federal courts have presumed without deciding that the Fourth Amendment applies to geofence warrants. *See* Brief of Amicus Curiae Google LLC in Support of Neither Party Concerning Defendant's Motion to Suppress Evidence from a "Geofence" General Warrant, *US v. Chatrie*, 590 F.Supp.3d 901 (E.D. Va. 2022) (Arguing that it is "[C]lear that a geofence request constitutes a 'search' within the meaning of the Fourth Amendment and that, absent an applicable exception, the Constitution independently requires the government to obtain a warrant to obtain LH information. Users have a reasonable expectation of privacy in their LH information, which the government can use to retrospectively reconstruct a person's movements in granular detail. Under Carpenter, the 'third-party doctrine' does not defeat that reasonable expectation of privacy merely because users choose to store and process the information on Google' servers."). *See also, e.g.,* 590 F. Supp. 3d at 925 ("Because the Court will independently deny Chatrie's motion to suppress by considering the validity of the Geofence Warrant, the Court 'need not wade into the murky waters of standing,' i.e., whether Chatrie has a reasonable expectation of privacy in the data sought by the warrant."); 579 F. Supp. 3d 62, 74 (D.D.C. 2021) ("Because the government applied for a search warrant, the Court assumes (but does not decide) that the Fourth Amendment's restrictions on searches and seizures apply to the collection of cell phone location history information via a geofence.").

[11] *See* quotes from *US v. Chatrie* and *Matter of Search of Info. that is Stored at Premises Controlled by Google LLC supra* at note 88.

[12] 579 F. Supp. 3d at 75 (D.D.C. 2021).

law enforcement asks for a geofence warrant when it is investigating a crime for which it has no leads.[13] One might expect the second requirement to present more of a barrier, but it often does not. Courts often assume that evidence will be available on the targeted database.[14] They assume that most people carry cellphones with them, and that those cellphones (and the apps they contain) are tracking the location information of the person in question.[15]

This version of the probable cause requirement offers no meaningful constraints on government authority. In this context, it becomes a mere formality: it is fair to assume that nearly everyone has a cellphone, and it is also fair to assume that nearly everyone with a cellphone is having their location tracked by Google, Yahoo, Microsoft, Snapchat, and any number of other companies.[16]

iii. Geofence Warrants and the Particularity Requirement

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[13] *See, e.g., id.* at 77. This may undermine some of the concerns evinced by reproductive rights activists in the wake of *Dobbs v. Jackson Women's Health Organization*, because it suggests that conducting a search to gather evidence of criminal activity (there, abortion) without evidence that a crime has occurred will likely face heightened challenges as to the probable cause requirement.

[14] *See, e.g.,* 497 F.Supp.3d at 356 ("Unlike virtually any other item, it is rare to search an individual in the modern age during the commission of a crime and not find a cell phone on the person. Thus, it is reasonable to infer that suspects coordinating multiple arsons across the city in the middle of the night, as well as any passersby witnesses, would have cell phones.").

[15] *See* 579 F.Supp.3d at 78. *In the Matter of Search of Info. that is Stored at Premises Controlled by Google LLC* (hereinafter "D.D.C case"), the court upheld the use of a geofence warrant to identify suspects alleged to have committed federal crimes in a remote, industrial location. Using the governing standard, the court determined that the requirement for probable cause had been met. The perpetrators were seen on CCTV using cellphones, and given the vastness of Google's location data troves, there was a fair probability that their information was available through a search of the company's data.

But as the court in the D.D.C. case notes, a showing that the suspect had a cellphone at the crime scene is not a requirement for finding probable cause. The court in the case says: "The core inquiry here is probability, not certainty, and it is eminently reasonable to assume that criminals, like the rest of society, possess and use cell phones to go about their daily business." The court notes that in another case, *Matter of Search Warrant Application for Geofence Location Data Stored at Google Concerning an Arson Investigation*, the district court granted a geofence warrant without evidence that the suspects possessed cellphones.

[16] 579 F.Supp.3d at 78 (noting that it would be the "relatively rare" case when a cell phone does not transmit location information to Google, noting that three-quarters of the world's phones contain Google's operating systems.).

Courts have used several factors to determine whether a geofence warrant meets the "particularity" required to issue a warrant. Typically, these factors include: geographic scope, density of the searched area, time span covered by the search, and time of search itself.[17] Ultimately, the particularity inquiry turns on how many people are reasonably likely to be caught up in a search.

Where the aforementioned factors suggest that a geofence search is likely to catch the activity of a large number of people, courts have often rejected the warrant for lack of particularity. For example, in *United States v. Chatrie*, the government had sought and obtained data from a geofence spanning over three football fields and encompassing both a bank and a church.[18] In deeming the warrant unconstitutional, the court highlighted its concern with the warrant's lack of particularity.[19] The court admonished that it was "difficult to overstate the breadth of the warrant."[20] In other cases where courts have upheld geofence warrants, they have noted the warrant's limited geographic and temporal scope, and the fact that the area covered by the warrant is unlikely to be densely populated.[21]

c. Geofence Warrant Analysis Might Not Apply Neatly to Reverse Keyword Search Warrants

Though geofence searches are, in many ways, the clearest analog to reverse keyword search warrants, the two forms of search are distinct in material ways. As to the third-party doctrine,

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[17] *See, e.g.,* 579 F.Supp.3d at 81-2 (analyzing the temporal and geographic scope of the geofence warrant to determine whether it was appropriate); 590 F. Supp. 3d at 918 (analyzing the temporal and geographic scope of the geofence warrant to determine whether it was appropriate).

[18] 590 F. Supp. 3d at 918.

[19] *Id*. at 930.

[20] *Id.*

[21] *See, e.g.,* 579 F.Supp.3d at 81-2 (finding that three hours of location data from a six-month time span was reasonable and particular within the meaning of the Fourth Amendment, and that a geofence covering only an undisclosed location and its parking lot was sufficiently narrow to meet the particularity requirement).

reverse keyword search warrants raise fewer concerns about location information and arguably entail more affirmative consent than geofence warrants, two factors that may make the third-party doctrine more likely to apply. As to the particularity requirement, it is more difficult to assess the scope of the warrant *ex ante* in the reverse keyword search warrant context than the geofence context. Finally, as to the probable cause requirement, it may be more difficult to assume that the information being sought is in the databases of a particular search engine provide in the reverse search context.

i. Location Information Not Implicated in the Same Way by Reverse Keyword Search Warrants

Even if the Fourth Amendment does constrain geofence searches, there is reason to think that *Carpenter*, and thus the Fourth Amendment, may nonetheless be inapplicable to reverse keyword search warrants. First, because geofence warrants implicate location-information, which the court has treated as meriting special concern in the Fourth Amendment context.[22] In *Carpenter* itself, the court noted the particular protections it had extended to surveillance implicating location information.[23]

Geofences are unlike reverse keyword searches in that they reveal an individual's precise location at a certain time. At worst, reverse keyword searches may reveal where an individual *intended* to go,[24] but they do not typically reveal their precise location and movements. This distinction may be material: revealing one's *intent* to go somewhere may not trench as closely on

[22] *Carpenter v. United States*,138 S. Ct. 2206, 2215 (2018) ("The Court has in fact already shown special solicitude for location information in the third-party context").
[23] *Id.*
[24] For example, in the Colorado case, *People v. Seymour*, the reverse keyword search warrant revealed the addresses that those caught in the warrant had searched for. The prosecution contended this was evidence that the defendants *did* go to this location. *People v. Seymour*, No. 21CR20001 (2022) (https://tinyurl.com/y46t9wsb).

protected privacy interests as revealing where someone actually *was*. Furthermore, many reverse keyword search warrants do not even reveal this much; in fact, several do not implicate location at all.[25] Rather, those warrants only reveal a person's interest in a particular topic or a particular individual.

ii. Reverse Keyword Search Warrants May Entail More Affirmative Consent than Location History

Reverse keyword searches are arguably distinct from both CSLI and geofence location information in that (1) online users more affirmatively "opt-in" to collection when they *enter* that information into a particular online search with an awareness that (2) that information is being closely monitored by Google.

First, online search can be characterized as materially distinct from the location tracking at issue in *Carpenter* and in geofence searches. Unlike location tracking, which is often enabled without any affirmative action by the user,[26] online search requires a user to actively go to a website (normally Google.com), and type in their query. And this affirmative action is often taken with complete knowledge of the fact that users' search activities are being closely monitored by the company.[27] *Carpenter* establishes that sometimes, revealing information to a third party does not undermine a user's reasonable expectation of privacy in that information, particularly when

[25] See Section I.a.ii, *supra*, discussing the Edina case, which only requested the information of those who had looked for a victim's name.

[26] Google officially claims that it only tracks the location of users who affirmatively opt-in to tracking. *Manage Your Location History*, Google (https://tinyurl.com/4jvrt6r9). Nevertheless, recent lawsuits and investigations have suggested that this location information is still being tracked and stored, even when users believe they have opted out. Taylor Hatmaker, *Google Gets Hit With a New Lawsuit Over 'Deceptive' Location Tracking*, TECH CRUNCH, Jan. 24, 2022 (https://tinyurl.com/6j7zr9md). Cecilia Kiang, *Google Agrees to $392 Million Privacy Settlement With 40 States*, N.Y. Times, Nov. 14, 2022 (https://tinyurl.com/6j7zr9md).

[27] Emilee Rader, *Awareness of Behavioral Tracking and Information Privacy Concern in Facebook and Google*, 14 SOUPS 51, 58-60 (study suggests that many internet users expect that Google is collecting what they are typing into the search bar, regardless of whether they actually submit the information).

information collection is subtle and the user has limited alternative options.[28] But in the case of online search, research suggests that the information collection in question is widely known, and there are alternative options (but query whether these alternatives are legitimate).[29] These distinctions suggest that at the very least, reverse keyword searches may be less likely to fall within the *Carpenter* doctrine than geofence warrants, their closest analog.

Second, geofence searches arguably come closer to the automatic CLSI collection in *Carpenter* than reverse keyword searches.[30] Traditional third-party doctrine assumes that an individual gives up their right to privacy by consensually revealing information to the third-party.[31] *Carpenter* found that the CSLI, though in a sense "voluntarily" handed over to cellphone companies, nevertheless could not truly be considered consensual because individuals had little meaningful choice in revealing that information.[32]

Like the CSLI in *Carpenter*, location information is often collected by companies like Google without much meaningful consent from users.[33] Like the CSLI in *Carpenter*, companies like Google track location information by default on users' phones. And echoing the argument

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[28] *See supra* note 73.

[29] Companies like DuckDuckGo actively market their search engines as more private, less-invasive alternatives to Google search. *Privacy*, DUCKDUCKGO, https://tinyurl.com/2p87fsxn. For more alternatives, see: *Matt Burgess, Four Privacy-First Google Search Alternatives You Need to Try*, WIRED (Aug. 30, 2021), https://tinyurl.com/mwkt88vh. Arguably, this suggests that users of Google Search have "assumed the risk" of having their search queries collected and disseminated to law enforcement under the logic of *Miller* and *Smith*.

[30] Google has argued that location information is, in fact, *more* invasive than CSLI. Brief of Amicus Curiae Google LLC in Support of Neither Party Concerning Defendant's Motion to Suppress Evidence from a "Geofence" General Warrant, *US v. Chatrie*, 590 F.Supp.3d 901 (E.D. Va. 2022) ("Moreover, LH information can often reveal a user's location and movements with a much higher degree of precision than CSLI and other types of data. And rather than targeting the electronic communications of only a specific user or users of interest, the steps Google must take to respond to a geofence request entail the government's broad and intrusive search across Google users' LH information to determine which users' devices may have been present in the area of interest within the requested timeframe.")

[31] *See supra* note 66, and accompanying text.

[32] 138 S. Ct. at 2220 (Arguing that CSLI is unlike traditional forms of third-party data because individuals are constantly compelled to use cellphones, and by the very fact of using those cellphones, sending location information to cell towers. The Court argues that without an "affirmative" act, there cannot be "meaningful" voluntary consent).

[33] *See supra* note 104.

made and accepted in *Carpenter*, individuals can hardly "opt-out" of having a cellphone in the modern world.[34] While users can opt out of location collection, Google makes it incredibly difficult for them to do so, and sometimes even covertly continues collection.[35] Thus, unlike the CSLI in *Carpenter*, the collection of location information is not a condition of owning a cellphone, but given the difficulty of intervening in such collection, it is arguably similarly non-consensual.

iii. More Difficult to Understand the Scope of Reverse Keyword Search Warrants *Ex Ante*

Geofences that extend over a large or densely-populated area, or that span a long period of time, are sometimes subject to scrutiny related to the particularity requirement.[36] It's difficult to see how similar limiting standards will be imposed on reverse keyword search warrants *a priori*. Under the particularity requirement, courts make a determination about the reasonableness of the scope of a search before the warrant is issued. Thus, in the case of reverse keyword searches, courts are obliged to guess, at the outset, how many individuals' information will be captured in the reverse search. This is true in the case of geofence warrants as well, but the criteria that the courts look to to make that determination (geographic scope, length of time, density of the requested search area), are the sort of variables that are ordinarily within a judge's competence to estimate and compare. The same cannot be said of the scope of online searches. Most people—and judges in particular—are unlikely to have a sufficiently expert understanding of online search and search

[34] *See supra*, note 73.

[35] See *supra*, note 104. For more on the barriers Google imposes on users who attempt to prevent the company from tracking their location, see: Emily Dreyfuss, *Google Tracks You Even If Location History's Off. Here's How to Stop It*, WIRED (Aug. 13, 2018), https://tinyurl.com/325tt4kp; *Google Found To Track The Location Of Users Who Have Opted Out*, NBC NEWS (Aug. 13, 2018), https://tinyurl.com/ktkchb8y.

[36] *See, e.g.,* 590 F. Supp. 3d at 930; 2020 WL 5491763 at *5 ("As noted *supra*, the geographic scope of this request in a congested urban area encompassing individuals' residences, businesses, and healthcare providers is not 'narrowly tailored' when the vast majority of cellular telephones likely to be identified in this geofence will have nothing whatsoever to do with the offenses under investigation.").

results to estimate just how "reasonable" a particular reverse keyword search warrant might be.[37] At the very least, these kinds of estimates would be far more susceptible to error than the more traditional estimates of time, area, and density involved in geofence searches.

One potential rejoinder to this point is that these issues can be resolved through Google's multi-step process. By this argument, the inability of courts to determine *ex ante*, how many users will be swept into the reverse keyword search does not present a Fourth Amendment problem, because a court can make this determination before de-anonymization. This argument presents several problems. First, as a practical matter, it's not clear that Google and other major tech companies provide truly anonymized information at Step 1.[38] Relatedly, for the reasons listed above, it's not clear that courts have the technological competency to determine whether information has truly been "anonymized" at Step 1.[39] It may be particularly difficult for a court to determine how the information from a reverse keyword search may be combined with other information at law enforcement's disposal to reveal information intended to be outside of the scope of the first stage.[40]

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[37] Indeed, the courts have often been accused of being significantly "behind the times" when it comes to understanding modern technologies. In 2010, for example, Chief Justice Roberts asked what the difference between a pager and email was. For more on this topic, see: Mary Graw Leary, *The Supreme Digital Divide*, 48 Tex. Tech L. Rev. 65, 71 (2015).

[38] In the *People v. Seymour*, for example, Google provided full IP addresses for each "anonymized" user at Step 1. *See* Motion Hearing Transcript at 105, *People v. Seymour*, No. 21CR20001 (2022) (https://tinyurl.com/y46t9wsb). An IP address can tell you the city, zip code or area code of your ISP, the name of your ISP, and a "best guess" of the latitude and longitude associated with that IP address. *See What You Get With This Tool*, What is My IP Address, http://whatismyipaddress.com. For example, my IP Address reveals my country, state, city, and the ISP associated with my computer (Columbia University). It also reveals the latitudinal and longitudinal coordinates associated with my IP address, which pinpoint a location eight minutes away from my home. Google's policy prohibits them from sharing complete IP addresses at Step 1, although they did so in this case. *See* Motion to Suppress Evidence from a Keyword Warrant & Request for a Veracity Hearing at ¶28, *People v. Seymour*, No. 21CR20001 (2022) (https://tinyurl.com/y46t9wsb).

[39] In fact, the extent to which any anonymization is truly possible, given our expanding data economy, is the subject of debate. *See*, *e.g.,* Gina Kolata, *Your Data Were 'Anonymized'? These Scientists Can Still Identify You*, N.Y. Times (July 23, 2019).

[40] Law enforcement agencies increasingly purchase access to services that aggregate information from data brokers. *See* Bennet Cyphers, *Inside Fog Data Science, the Secretive Company Selling Mass Surveillance to Local Police*,

iv. *Assumptions about Probable Cause are More Difficult to Make with Respect to Search History*

Courts assume (likely rightly) that individuals nearly always have a smart phone on them, and that smartphones are nearly always tracking the location of their owners.[41]

At first, it may seem that Google searches are equally ubiquitous. After all, Google fields 8.5 billion searches per day (99,000 per second).[42] However, it's not clear that individuals engaged in criminal activity are likely to conduct a Google search related to that activity. This potentially lower probability must in turn be discounted by the likelihood that the particular set of terms that an investigator queries in a reverse keyword search warrant are likely to be the ones that an individual engaged in criminal activity would have used. For these reasons, it seems nearly certain that the likelihood of conducting a successful geofence search is higher than the likelihood of conducting a successful reverse keyword search warrant. This in turn suggests that it is less "probable" that the requested evidence (incriminating search history) is in the location to be searched (Google's databases).

d. How might courts Analyze Reverse Keyword Searches

i. Third Party Doctrine and Reverse Keyword Searches

EFF (Aug., 21, 2022); Sharon Bradford Franklin, Greg Nojeim, Dhanaraj Thakur, *Legal Loopholes and Data for Dollars: How Law Enforcement and Intelligence Agencies Are Buying Your Data from Brokers, Center for Democracy and Technology* (Dec. 9, 2021). Frequently, they maintain that use of such services does not implicate any Fourth Amendment issues. Cyphers, *Inside Fog Data Science* ("Troublingly, those records show that Fog and some law enforcement did not believe Fog's surveillance implicated people's Fourth Amendment rights and required authorities to get a warrant."). Access to such resources can augment arguably "anonymized" searches, such as Step 1 of reverse keyword searches or geofence searches.

[41] *Mobile Fact Sheet*, Pew Research Center (April 7, 2021), https://tinyurl.com/yadh2yt4 (finding that 85% of Americans own smartphones).

[42] Maryam Mohsin, *10 Google Search Statistics*, Oberlo: Blog (Jan. 2, 2022), https://tinyurl.com/mwta2acc.

People v. Seymour is currently the only case addressing the use of reverse keyword search warrants. There, law enforcement used a reverse keyword search warrant to identify suspects in an arson investigation.[43] The reverse keyword search identified all users who had searched for the victims' address around the time of the arson.[44]

The Colorado District Court in *Seymour* found that the reverse keyword search at issue required the use of a warrant.[45] In justifying its decision, the court relied on federal law and in the alternative, state constitutional law.[46] Further, the court argued that the *type* of information at issue here was distinct from traditional information shared through the third-party doctrine because of the inescapability of the internet.[47]

Google has largely assumed that other reverse searches (geofence searches), require a warrant, and thus are not covered by the third-party doctrine.[48] In the geofence context, courts have consistently refused to investigate whether *Carpenter* applies—many instead "assume without deciding" that a warrant is required.[49] Google has extended its warrant requirement to the reverse keyword search warrant, and we might expect courts to do the same. If they do, then reverse keyword searches will presumptively require a warrant.

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[43] Motion Ruling Transcript at 22-23, *People v. Seymour*, No. 21CR20001 (2022) (https://tinyurl.com/34ap8s94); District Court's Response to the Order to Show Cause at 22-24, *People v. Seymour*, No. 21CR20001 (2022) (https://tinyurl.com/bdfw2bsy).

[44] *Id.*

[45] *Id.*

[46] District Court's Response to the Order to Show Cause at 22-24, *People v. Seymour*, No. 21CR20001 (2022) (https://tinyurl.com/bdfw2bsy).

[47] District Court's Response to the Order to Show Cause at 22-23, *People v. Seymour*, No. 21CR20001 (2022) (https://tinyurl.com/bdfw2bsy) ("[T]he U.S. Supreme Court has been hesitant apply the third-party doctrine to digital records… Moreover, this Court has demonstrated a willingness to interpret the state constitution to afford broader protections than its federal counterpart. This is especially true as to the third party doctrine. Splitting with *Miller* and *Smith* respectively, this Court has held that Coloradans maintain a reasonable expectation of privacy under the Colorado Constitution in their financial records, and their telephone records, even though both reside with third parties." (citations omitted)).

[48] *See* Section II.B.i, *supra*, discussing courts' assumptions about whether geofence searches require a warrant.

[49] See *supra*, note 88.

Quite another question is whether reverse keyword search warrants *should* require a warrant. On one hand, reverse keyword searches involve the use of data collected by an internet service most people use almost daily. Even if these individuals are aware the information is being shared with Google, it is doubtful that they expect this information will be subject to invasive search by law enforcement.

However, reverse searches are "wide" rather than "deep" searches, a factor that seems to cut against the applicability of *Carpenter*.[50] They typically do not directly involve location information, which again cuts against the applicability of *Carpenter*. They also involve information that is arguably more consensually given than the CSLI in *Carpenter*, which was collected automatically from anyone who carried a phone. Search history may also be more consensually given than location history, which is collected nearly ubiquitously and very difficult to delete.

Carpenter's frustrating ambiguity sheds little light on the salience of these differences. Reading *Carpenter* narrowly, the differences between search history and location information seem to cut in favor of applying the third-party doctrine to reverse keyword searches. Without further elaboration from the Supreme Court, it's difficult to tell how far the analysis in *Carpenter* should extend.

ii. Probable Cause and Reverse Keyword Searches

As noted in Part II.C.iv, there are differences in the probable cause analysis involved in a geofence search and those involved in a reverse keyword search. Nevertheless, that distinction

[50] 590 F.Supp.3d at 926 (Discussing the validity of geofence warrants: "As this Court sees it, analysis of geofences does not fit neatly within the Supreme Court's existing 'reasonable expectation of privacy' doctrine as it relates to technology. That run of cases primarily deals with deep, but perhaps not wide, intrusions into privacy.").

may turn out to be immaterial. In determining whether a particular piece of information is likely to fall within the parameters of the probable cause requirement, courts have used a "fair probability" standard.[51] Even if the likelihood that an individual involved in criminal activity conducted an online search is lower than the likelihood that an individual involved in criminal activity's location was captured, there is still a "fair" likelihood that the former occurred. After all, the average person uses Google three to four times per day.[52] Most modern queries pass through an online search engine, and 92% of all global searches happen on Google.[53]

Perhaps this kind of bare showing that "most people Google things" will prove insufficient for a finding of probable cause.[54] However, it's not clear that a substantially stronger standard will replace it. In *People v. Seymour*, the Colorado courts found that the government made a sufficient showing of probable cause by arguing that the arson in the case was targeted, rather than random.[55] The government made this showing by arguing that the house was "non-descript," and that arson was a crime of a violent nature.[56] As a result, the state argued, it was likely that the individuals involved in the crime had searched for the address of the targeted home online.[57] At bottom, the standard the state appears to be relying on in *Seymour* is simply that if a crime appears to be pre-

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[51] 579 F.Supp.3d at 74 (Holding that probable cause and fair probability are synonymous, and further that: "[a]t bottom, probable cause 'is not a high bar.'").

[52] Hazel Emnace, *23 Essential Google Search Statistics*, FIT SMALL BUSINESS (Oct. 25, 2022), https://tinyurl.com/veds8pfr.

[53] *Id.*; A Pew Research Center study found that 46% of surveyed individuals turned to online tools to conduct their research, compared to 25% who said they consulted with others, 8% of individuals who relied on print media, and 11% who relied on prior education. Eric Turner and Lee Rainie, *Most Americans Rely on Their Own Research to Make Big Decisions, And That Often Means Online Searches*, Pew Research Center (Mar. 5, 2020), https://tinyurl.com/nr6bb6am.

[54] Though there is reason to doubt that this will be the case. In the geofencing context, some courts have attempted to circumscribe the probable cause requirement by requiring that the government have evidence that a cellphone was used in the course of the crime. But over time, most courts have dropped this requirement.

[55] District Court's Response to the Order to Show Cause at 29, *People v. Seymour*, No. 21CR20001 (2022) (https://tinyurl.com/bdfw2bsy).

[56] *Id.*

[57] *Id.*

mediated, rather than random, there will be probable cause. This remains a far cry from the constraints of the traditional probable cause inquiry.

iii. Particularity and Reverse Keyword Search Warrants

As noted above, the particularity standard used in geofence search cases seems difficult to import into the geofence context. Geofence cases rely on variables like the size of the area in question, its population density, the time of day and span of time at issue in the search to determine whether a geofence warrant is sufficiently particular. Courts may use a similar strategy for reverse keyword search warrants, for example by evaluating how many terms are used in a particular search, whether the terms themselves are rare or common words, whether the search requires that certain phrases be included or excluded.

Nevertheless, the above-expressed concern remains: It would be difficult for the average person, let alone the average judge, to determine how many hits a search was likely to generate *ex ante*. The lack of judicial competence in this area could lead to two problems: First, that judges apply their own intuitions about the scope of a search *too* liberally, and thus yield varied results across warrant applications, making it difficult to anticipate whether particular activity will be protected. Second, and perhaps more plausibly, judges may understand their limited expertise in this area and apply criteria from previous cases *too* rigidly. Take this stylized example: if another court found twenty terms in a search was sufficiently particular, then the court in question may find that twenty-one terms is *per se* sufficient. This may not lead to the same issues of uncertainty, but it may make the warrant process open to manipulation or inflexible to the point of unfairness.

Particularity, in the context of reverse keyword searches, is the Fourth Amendment requirement with the fewest analogs in existing case law, and thus its application in the reverse keyword search context is difficult to predict. Nonetheless, what *is* foreseeable is that the existing

way in which courts evaluate particularity in the reverse search context cannot be readily imported into this context. Attempts to do so will likely be problematic and insufficiently protective.

e. The Good Faith Exception

Reverse searches have appeared in a moment in Fourth Amendment legal history in which the parameters of constitutional search are in flux.[58] This, of course, is no accident: *Carpenter* is itself the manifestation of a Fourth Amendment scrambling to keep pace with the explosion of digital surveillance tools available to law enforcement in the modern age.[59]

As the preceding pages have demonstrated, Fourth Amendment law is confusing and uncertain, and particularly confusing and uncertain to those subject to reverse search warrants. For criminal defendants against whom reverse keyword searches are used, this uncertainty may even work against them because of the existence of the good faith exception.

The good faith exception holds that where police conduct a search in reliance on a "reasonable and good faith belief that their conduct is lawful," the evidence they collect from said search will not be excluded in later legal proceedings.[60] A line of cases beginning with *United States v. Leon* suggest that if evidence is obtained in a manner that violates the Fourth Amendment, but an officer has not behaved in a "deliberate," "reckless" or "grossly negligent" manner, the evidence will not be excluded.[61] It does not seem likely that a court would characterize a search based on a doctrine rife with uncertainty as "deliberate" or "reckless." Thus, the doctrine's lack of clarity is itself a

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[58] For further evidence of this constitutional uncertainty, see Tokson, *supra* note 76.

[59] *See* Susan Freiwald & Stephen W. Smith, *The Carpenter Chronicle: A Near-Perfect Surveillance*, 132 HARV. L. REV. 205, 205-6 (2018).

[60] *United States v. Leon*, 468 U.S. 897, 909 (1984) ("Nevertheless, the balancing approach that has evolved in various contexts—including criminal trials—'forcefully suggest[s] that the exclusionary rule be more generally modified to permit the introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment'").

[61] *Davis v. United States*, 564 U.S. 229, 238 (2011).

shield for officers who conduct novel and under-litigated forms of search, such as the one at issue in this Note.

Furthermore, the highly factual nature of the particularity requirement in these cases (e.g., was the size of the data retrieved too large? Were the search terms sufficiently narrow?) is unlikely to set clear enough precedents for officers to be expected to learn from the invalidation of a reverse keyword search warrant. Therefore, it is unlikely that successive invalidations will have much of an effect on the applicability of the good faith exception in this context.

And while Google (and the courts whose decisions are available to the public) have largely assumed that reverse searches are Fourth Amendment searches requiring a warrant, the preceding analysis demonstrates that that is far from clear. Where a reverse keyword search is conducted without a warrant, law enforcement may rely on the good faith exception to admit evidence that is deemed unconstitutionally obtained. A recent study of courts applying *Carpenter* found that in in nearly 40% of cases where the constitutional validity of a search was at issue, the court never answered the question of whether *Carpenter* applied. [62]

Courts have been slow to take up reverse searches, and where they have taken up such searches, they have consistently failed to explore whether *Carpenter* applies.[63] This approach sustains the murkiness of the doctrine, which in turn makes it easier for challenged law enforcement officers to rely on the good faith doctrine as a defense.

f. Conclusion: The Fourth Amendment Is Insufficiently Protective

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[62] Tokson, *supra* note 76 at 1809.
[63] Courts have largely assumed without deciding that *Carpenter* applies. *See supra* note 88.

The Fourth Amendment has been decried by myriad scholars and judges as insufficiently protective of privacy interests in the modern world.[64] In the case of reverse keyword search warrants, there is reason to suspect that the Fourth Amendment's protections (such that they are) will not extend to this new search practice. There is also reason to expect that where the Fourth Amendment does apply, its central guardrails—probable cause and particularity—may not be adequately protective of privacy interests. And finally, under the good faith exception, a court finding that a reverse keyword search has been improperly conducted or a warrant for such a search has been improperly issued is unlikely to offer any substantive recourse to present criminal defendants or future ones. The reverse keyword search warrant is a case study in just how ineffectual the Fourth Amendment, without more, can be—and, in particular, what an inadequate safeguard it can be in the face of rapidly advancing technology.

[64] *See* Freiwald and Smith, *supra* note 135 at 205-6 ("On May 24, 1844, a crowd gathered inside the United States Supreme Court chambers in the basement of the Capitol, eagerly awaiting a demonstration of an amazing new communication technology. They watched as inventor Samuel F.B. Morse successfully sent the first long-distance telegraph message—"What hath God wrought?"—to a railroad station near Baltimore.[…] That day may well have marked the last time the Supreme Court was completely in step with modern communication technology").; *See also* Neil Richards, *The Third-Party Doctrine and the Future of the Cloud,* 94 WASH. U.L. REV. 1441, 1447-1465 (2017) (discussing the Fourth Amendment's "lag problem").

Applicant Details

First Name	**Mohammed**
Middle Initial	**A**
Last Name	**Al-Shawaf**
Citizenship Status	**U. S. Citizen**
Email Address	**ma2112@georgetown.edu**
Address	**Address** Street **6630 Blair Rd NW** City **Washington** State/Territory **District of Columbia** Zip **20012** Country **United States**
Contact Phone Number	**8314022229**

Applicant Education

BA/BS From	**University of California-Berkeley**
Date of BA/BS	**May 2009**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 10, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Phillips, Anjali
Anjali.W.Phillips@who.eop.gov
Super, David
das62@georgetown.edu
202 525 9132
Garland, Rachel
RGarland@clsphila.org
Chertoff, Meryl
mjc87@georgetown.edu
9083707082

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Mohammed Al-Shawaf
6630 Blair Road NW
Washington, D.C. 20012

June 11, 2023

The Honorable Jamar K. Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am a rising third-year student at Georgetown University Law Center and am writing to apply for a 2024 term clerkship. I am interested in clerking in your chambers because of your stellar reputation within the White House Counsel's Office, where I was a law clerk last semester. Additionally, I have personal and professional ties to the DMV area and plan to stay in the region after I graduate, another reason why I am interested in clerking on the Eastern District of Virginia.

I am a nontraditional applicant pursuing a district clerkship because I have always been motivated to serve my community. As the son of Iraqi-Americans whose lives were upended by war, I remember my parents having to work multiple jobs and struggling to make ends meet when I was growing up. That experience stuck with me and inspired me to work with people, especially from vulnerable communities, to build capacity and connections to economic opportunity. Prior to law school, I worked for ten years in small and large companies managing social and economic impact programs and partnerships. Although I am proud of the initiatives I led—from increasing access to finance for small and disadvantaged businesses to creating training and job pathways for diverse communities—I believed I could make a greater impact by working directly in the public interest.

Since entering law school, I have prioritized practicing law in different public interest settings, both as an advocate and at various levels of government, including as a full-time law clerk at the White House Counsel's Office. I am fascinated by how our system of government works and how it can be more just, fair, and equitable. I am interested in clerking because I want to gain a first-hand perspective on judicial deliberation and the way judges effectuate justice, both among the parties and in their community. I believe that the diversity of my experience before and during law school and my commitment to public service would make me a unique and valuable addition to your chambers.

I have attached my resume, transcripts, and writing sample. Letters of recommendation from Professor David Super (das62@georgetown.edu), Professor Meryl Chertoff (mjc87@georgetown.edu), my legal supervisor at the White House Counsel's Office, Anjali Phillips (Anjali.W.Phillips@who.eop.gov), and my legal supervisor at Community Legal Services, Rachel Garland (rgarland@clsphila.org), will be sent under separate cover from Georgetown's Clerkship Office.

Thank you and I look forward to the opportunity to interview with you and your chambers staff.

Respectfully,

Mohammed Al-Shawaf

Mohammed Al-Shawaf

6630 Blair Rd NW, Washington, D.C. 20012 | ma2112@georgetown.edu | 831-402-2229

EDUCATION

Georgetown Law School, Washington, D.C. (2021—2024)
J.D. Candidate, 3.65 cumulative GPA (3.85 2L year)
Honors: Top 10% (2L year, prior year cutoff); Anne Fleming Legal Services Fellow; Renne Public Law Fellow
University of California, Berkeley, Berkeley, CA (2005—2009)
B.S. in Business Administration, 3.91 GPA
Honors: *summa cum laude;* Dean's List for five semesters

LEGAL EXPERIENCE

California Department of Justice, Consumer Protection Section (6/2023—Present)
- Contribute to multistate investigation involving novel technology and consumer protection legal issues.

The White House Counsel's Office (1/2023—5/2023)
- Researched and drafted vetting memos for potential judicial and other Senate-confirmed nominees.
- Prepared memos involving novel legal questions and applicable case, statutory and regulatory precedent.
- Reviewed proposed agency rules and recommended areas for input based on White House equities.
- Conducted legal research and contributed to guidance related to the Administration's equity policies.

Consumer Financial Protection Bureau, Legal Division (8/2022—11/2022)
- Researched and drafted parts of an appellate brief related to debt practices of national student loan trust.
- Wrote and presented memo to General Counsel to inform untested application of Bureau's authority.

Community Legal Services, Housing Unit (5/2022—8/2022)
- Managed pre-trial caseload of clients facing eviction, conducting intake and advising on defenses.

U.S. House Committee on Oversight and Reform, Economic Policy (1/2022—4/2022)
- Co-led significant consumer product investigation, contributing to successful legislative fix.

Georgetown Law Center on Poverty and Inequality (8/2021—12/2021; 6/2022—8/2022)
- Researched and co-wrote major report on effect of market power on racial and economic inequality.

OTHER PROFESSIONAL EXPERIENCE

WeWork, New York, NY
Director of Impact and Public Policy Partnerships (7/2017—8/2020)
- Launched global refugee initiative, training and hiring hundreds of refugees and serving as spokesperson.
- Scaled a local veterans program into a national veteran and military spouse business incubator in 20 cities, growing the businesses of 400+ entrepreneurs while leading a team of 50 staff and volunteers.
- Developed and launched a national economic opportunity research partnership with the Aspen Institute.
- Managed a high-performing team, including consultants and agencies, and a $1M budget.

Getaround, San Francisco, CA
Head of Public Policy and Business Development (3/2015—6/2017)
- Built partnerships with policymakers and community groups in 10 cities to grow carsharing market.
- Managed government grant and pilot program, including with the SFMTA and the City of Chicago.
- Negotiated and launched a technology partnership with Toyota, resulting in a $10M strategic investment.

SustainAbility, Washington, D.C., London, UK & San Francisco, CA
Manager and Head of Trends and Cities Practices (9/2010—2/2015)
- Managed ESG strategy projects for F500 companies in mobility, energy, and cities practices.
- Managed global research initiatives, including a trends team and a quarterly ESG survey partnership.

Kiva, Ramallah, Palestine
Kiva Microfinance Fellow with CHF International and FATEN (9/2009—1/2010)
- Executed 20-week work plan in 10 weeks, streamlining the loan processes of the two largest microfinance lenders in country and growing the number of loans dispersed to micro-entrepreneurs.

Record of: Mohammed Al-Shawaf
GUID: 813478545

Course Level: Juris Doctor

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	001	93	Legal Process and Society Naomi Mezey	4.00	B+	13.32	
LAWJ	002	93	Bargain, Exchange, and Liability David Super	6.00	A-	22.02	
LAWJ	005	30	Legal Practice: Writing and Analysis Jessica Wherry	2.00	IP	0.00	
LAWJ	009	31	Legal Justice Seminar Kevin Tobia	3.00	B+	9.99	

	EHrs	QHrs	QPts	GPA
Current	13.00	13.00	45.33	3.49
Cumulative	13.00	13.00	45.33	3.49

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	003	93	Democracy and Coercion Louis Seidman	5.00	B+	16.65	
LAWJ	005	30	Legal Practice: Writing and Analysis Sherri Lee Keene	4.00	B+	13.32	
LAWJ	007	93	Property in Time Daniel Ernst	4.00	A-	14.68	
LAWJ	008	32	Government Processes Glen Nager	4.00	A	16.00	

	EHrs	QHrs	QPts	GPA
Current	17.00	17.00	60.65	3.57
Annual	30.00	30.00	105.98	3.53
Cumulative	30.00	30.00	105.98	3.53

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	1491	110	~Seminar Alexander Blanchard	1.00	A	4.00	
LAWJ	1491	112	~Fieldwork 3cr Alexander Blanchard	3.00	P	0.00	
LAWJ	1491	19	Externship I Seminar (J.D. Externship Program) Alexander Blanchard		NG		
LAWJ	165	07	Evidence Gerald Fisher	4.00	A-	14.68	
LAWJ	410	05	State and Local Government Law Meryl Chertoff	3.00	A	12.00	
LAWJ	565	05	Globalization, Work, and Inequality Seminar Alvaro Santos	3.00	A	12.00	

In Progress:

	EHrs	QHrs	QPts	GPA
Current	14.00	11.00	42.68	3.88
Cumulative	44.00	41.00	148.66	3.63

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	1447	08	Mediation Advocacy Seminar	2.00	A	8.00	
LAWJ	1492	41	Externship II Seminar (J.D. Externship Program)		NG		
LAWJ	1492	89	~Seminar	1.00	A	4.00	
LAWJ	1492	91	~Fieldwork 3 cr	3.00	P	0.00	
LAWJ	215	07	Constitutional Law II: Individual Rights and Liberties	4.00	A-	14.68	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	10.00	7.00	26.68	3.81
Annual	24.00	18.00	69.36	3.85
Cumulative	54.00	48.00	175.34	3.65

End of Juris Doctor Record

CALCENTRAL

Academic Summary

Student Profile

Name	Mohammed Al-Shawaf
Student ID	17971966
Academic Career	Undergraduate
Level	Senior
Cumulative Units	**Total Units** 144 **Transfer Units** 16.000 **P/NP Total** 9.5 **P/NP Passed** 9.5
Cumulative GPA	3.825
Degree Conferred	**Bachelor of Science** in **Business Administration** Awarded: May 21, 2009 Haas School of Business High Honors in Business Administration

Enrollment

Undergraduate Transfer Credit

Exam/Other Credits	**Units**
Advanced Placement (AP)	16.000
Total Exam Units:	**16.000**

Fall 2005

Class	Title	Un.	Gr.	Pts.
HISTORY 5	European Civilization from the Renaissance to the Present	4	A	16
POLSCI 2	Introduction to Comparative Politics	4	A	16
POLSCI 41	Freshman Seminar	4	A+	16
UGBA 10	Principles of Business	3	A+	12

Spring 2006

Class	Title	Un.	Gr.	Pts.
ECON 1	Introduction to Economics	4	A	16
ETHSTD 21AC	A Comparative Survey of Racial and Ethnic Groups in the U.S	4	B+	13.2
FILM 50	Introduction to Film for Nonmajors	4	A+	16
LS 140A	Historical Studies	4	A	16

Fall 2006

Class	Title	Un.	Gr.	Pts.
ARABIC 1A	Elementary Arabic	5	A+	20
IDS 110	Introduction to Computers	4	A	16
MATH 16A	Analytic Geometry and Calculus	3	B+	9.9
RHETOR 39G	Freshman/Sophomore Seminar	1.5	A	6

Spring 2007

Class	Title	Un.	Gr.	Pts.
ARABIC 1B	Elementary Arabic	5	A-	18.5
POLECIS 101	Contemporary Theories of Political Economy	4	A	16
PUBPOL 198	Directed Group Study	1	P	0.0
STAT 21	Introductory Probability and Statistics for Business	4	A-	14.8

Summer 2007

Class	Title	Un.	Gr.	Pts.
UGBA 100 (Session D)	Business Communication	2	A	8
UGBA 107 (Session D)	The Social, Political, and Ethical Environment of Business	3	A-	11.1

Fall 2007

Class	Title	Un.	Gr.	Pts.
ARABIC 20A	Intermediate Arabic	5	A+	20
ESPM 150	Special Topics in Environmental Science, Policy, and Management	3	A+	12

Class	Title	Un.	Gr.	Pts.
UGBA 101A	Microeconomic Analysis for Business Decisions	3	A	12
UGBA 102A	Introduction to Financial Accounting	3	A+	12

Spring 2008

Class	Title	Un.	Gr.	Pts.
ARABIC 20B	Intermediate Arabic	5	A-	18.5
ECON 100B	Economic Analysis--Macro	4	A-	14.8
UGBA 102B	Introduction to Managerial Accounting	3	B+	9.9
UGBA 105	Introduction to Organizational Behavior	3	A	12
UGBA 196	Special Topics in Business Administration	1	A	4

Fall 2008

Class	Title	Un.	Gr.	Pts.
CYPLAN 113B	Community and Economic Development	3	A-	11.1
IAS 115	Global Poverty: Hopes and Challenges in the New Millennium	4	A	16
NESTUD 190E	Special Topics in Fields of Near Eastern Studies: Arabic	4	P	0.0
UGBA 106	Marketing	3	A	12
UGBA 192P	Strategic Corporate Social Responsibility and Consulting Projects	3	A-	11.1

Spring 2009

Class	Title	Un.	Gr.	Pts.
ANTHRO 181	Themes in the Anthropology of the Middle East and Islam	4	B+	13.2
NESTUD 190E	Special Topics in Fields of Near Eastern Studies: Arabic	4	P	0.0
PHYSED 1	Physical Education Activities	0.5	P	0.0
UGBA 103	Introduction to Finance	4	B+	13.2
UGBA 196 LEC 001	Special Topics in Business Administration	3	A+	12
UGBA 196 LEC 002	Special Topics in Business Administration	2	A	8

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to provide this letter of recommendation for Mohammed Al-Shawaf as he seeks employment as a Judicial Clerk. Mo served as an Intern on the Ethics & Compliance team in the Office of the White House Counsel during the Spring semester 2023. I had the pleasure of serving as Mo's internship coordinator, although he worked closely with and received assignments from several attorneys over the course of his internship.

Mo was a thoughtful and productive team member who approached each project with enthusiasm. He asked insightful questions when receiving assignments, conducted exhaustive research, and created clear and well-written work product. He completed projects quickly and efficiently, even when he had to absorb new areas of the law first. He diplomatically juggled competing projects for multiple attorneys, diligently checking in to ensure he was meeting all expectations and prioritizing as appropriate.

Most of all, Mo was a wonderful presence in the office. He is courteous, collegial, and professional, and our team benefitted from his support over the past few months. I am very happy to support him with my strong recommendation.

Very respectfully,

Anjali Phillips
Special Assistant to the President and
Associate Counsel

Anjali Phillips - Anjali.W.Phillips@who.eop.gov

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am delighted to write in support of Mohammed Al-Shawaf's application for a clerkship in your chambers. Mr. Al-Shawaf is a talented, hard-working law student firmly committed to a career in public service. He will make an excellent law clerk and an even better attorney.

I came to know Mr. Al-Shawaf when he was enrolled in my class that combines Torts with Contracts. This course is part of Georgetown's alternative curriculum, which typically attracts the most intellectually adventurous students. Mr. Al-Shawaf was very much that sort of student: eager to explore the law from a variety of perspectives, wanting to know not just where it is today but where it came from and where it might be going. He was consistently impressive in all aspects of my course: in class, with his questions during office hours, and on the midterm and the final. He is very smart, has a nuanced vision of the law, writes with subtlety and finesse, and recognizes hidden tensions doctrinal rules and their policy justifications. He is well-equipped produce work that is both of the highest standards technically and that provides thoughtful perspectives on the cases before you beyond merely recounting those advanced by counsel.

Mr. Al-Shawaf is quite remarkable for the depth and breadth of his interests in the law. At my invitation, we met several times to discuss legal issues far-removed from the topics within my course, both during his time in my class and from time to time since. On any topic, he has numerous questions, which are uniformly terrific. He is a true intellectual, but unlike many students of his intellect and range of interests, he also is deeply interested in how things work in the real world. As a law clerk, I would expect him to give you comprehensive research, concise and accurate analyses of the issues in a case before you, but also the benefit of his considerable common sense and insight into what is actually happening between the parties.

I have no doubt that Mr. Al-Shawaf will be an excellent team player and favorite of the other members of your staff. He is flawlessly polite and exceedingly considerate – going to great lengths to minimize his burden on my time – but he also has a pleasant but respectful informality about him. And although he remains fully focused when work is in order, at down times he has a delightful understated sense of humor.

In sum, I can confidently and enthusiastically recommend Mohammed Al-Shawaf for a clerkship in your chambers. He is precisely the kind of student whose accomplishments will bring pleasure and pride to all those that mentored him for many years to come. I would be happy to provide any additional information that you might require to evaluate his application.

Sincerely yours,

David A. Super
Carmack Waterhouse Professor of Law and Economics

David Super - das62@georgetown.edu - 202 525 9132

May 23, 2023

Re: Mohammed Al-Shawaf Clerkship Application

Dear Judge,

I am writing to highly recommend Mohammed Al-Shawaf for a clerkship in your chambers. I am the Managing Attorney of the Housing Unit at Community Legal Services in Philadelphia. Community Legal Services is a nonprofit organization providing direct legal representation, advocacy and community education for low-income Philadelphians for a wide range of civil legal issues. Mohammed worked in the Housing Unit as a law student intern after completing his first year of law school at Georgetown University. I oversaw Mohammed's work during our ten-week internship program and have kept in touch with him since working together.

We selected Mohammed for our summer law student internship program because of the dedication he had shown prior to law school to understanding how systemic inequality historically and currently marginalizes minority communities and his work to address these inequalities. With minimal supervision, Mohammed managed a caseload of clients facing eviction prior to their hearing dates. Mohammed interviewed the clients, advised them of their rights and legal defenses and assisted supervising attorneys with trial preparation and settlement negotiation in Municipal Court. Being a successful attorney at Community Legal Services requires someone who is adept at leveraging legal, policy and advocacy tools to advance protections for our clients. Mohammed's past experience leading social impact projects in large and small organizations and his commitment to economic justice across his work experience and in law school made him a valuable asset to CLS.

Because of his experience, enthusiasm and proactive nature, Mohammed also made himself an important contributor to CLS' policy priorities in a very short period of time. In addition to his regular caseload, Mohammed took the initiative to quickly learn and contribute to Philadelphia's new Eviction Diversion Program, considered a national model and highlighted in a letter from the Department of Justice to the fifty state supreme court justices. Mohammed conducted legal research and wrote claim and demand letter templates so that CLS attorneys and unrepresented tenants could better enforce new eviction prevention laws as part of the Eviction Diversion Program.

While Mohammed has a diverse legal and non-legal work background, the through line is a commitment to working towards the public interest and a persistence in developing and applying his considerable skills to that effort. I saw the value of Mohammed's skills, initiative, and experience working with him last summer and it is why I believe he would be a great addition to your chambers. Please call me at (215) 981-3778 or email me at rgarland@clsphila.org if I can be of any further assistance.

Sincerely,

Rachel Garland
Managing Attorney, Housing Unit

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write this letter of recommendation on behalf of Mohammed Al-Shawaf, who was a student in my State and Local Government Law class in the fall semester of 2022. Mohammed ("Mo") was a star in a class that included several very strong students, the kind of students who make it worth teaching in the first place. Mo stood out for several reasons, and I want you to tell you about them.

First, Mo was exceptionally mature, bringing with him from his impressive years of work experience a wide range of content area knowledge and academic acumen. This was in addition to his level of preparation, which was flawless, his thoughtful and synthetic oral interventions in the classroom, and some of the best-written papers I have read in a dozen years of teaching. Not only was his research thorough, but he brought in both legal and policy materials, and wove them together seamlessly. For his midterm paper, he wrote about a local energy model in California, its statutory background, and the underlying legal and policy choices that shaped its development and ongoing implementation. After the papers were de-anonymized, I saw that I had written on his–"a pleasure to read"--and it was. I started my legal teaching many years ago as an instructor of legal writing, and my standards for writing are high. There was not a single thing I would have changed in that essay; and in fact, I am encouraging Mo to submit it for publication.

Mo also has unique personal qualities which would make him an excellent law clerk. First, he has exceptional emotional intelligence. As you may know, the transition back to a post-pandemic "normal" classroom has been something of a challenge. In Mo, I had an ally. He is a connector, and a natural leader. He suggested a classroom seating layout that allowed for better inclusion and communication, and improved the classroom experience for everyone that way. He had a way of checking in on his peers. He listened in the classroom both to the professor and to the other students, asked questions that furthered the conversation, and he was not afraid to ask for guidance when he thought he needed it (and sometimes, I think, when he believed others might need it)

I have had several conversations with Mo outside of class, and he is thoughtful, committed to social justice, and a general delight. His resume, which I know you have seen, shows an ascending degree of responsibility in policy jobs, including some impressive leadership positions, and most recently a coveted position in the White House Counsel's office. I have no doubt that Mo will ascend to a leadership role in public law, and we'll be lucky to have a public servant like him. A clerkship would be a valuable part of his education, because of the rigor of the judicial writing and research process, and the mentorship he will receive. I believe that if you hire Mo, he will become a valuable mentee, thought partner, and member of the family of clerks. He has my highest recommendation, and I would be glad to answer any questions.

Very respectfully,

Meryl Justin Chertoff
Adjunct Professor of Law and
Executive Director
Georgetown Project on State and Local Government Policy and Law

Meryl Chertoff - mjc87@georgetown.edu - 9083707082

Mohammed Al-Shawaf

6630 Blair Rd NW, Washington, D.C. 20012 | ma2112@georgetown.edu | 831-402-2229

WRITING SAMPLE

The attached writing sample is an excerpt from a brief I submitted in my Legal Research and Writing course. The fictitious case, *United States v. Bell*, involved an order from the United States District Court for the District of Maryland to suppress evidence because the government's stop of Mr. Bell violated his Fourth Amendment rights. I represented the petitioner, the United States, appealing the district court's order to the United States Court of Appeals for the Fourth Circuit.

The following sections of the brief are omitted for space: Cover page, Table of Authorities, and Argument Section II A (2) and B (1). The Statement of the Case follows course instructions for citations to the record (Joint Appendix or JA). This sample has not been edited by others and is entirely my own work.

STATEMENT OF THE ISSUE

Whether the district court erred when it did not find that a trained narcotics agent had reasonable suspicion to stop a suspected drug smuggler after the agent verified significant details of an anonymous tip and observed the defendant's evasive behavior.

STATEMENT OF THE CASE

Special Agent William Moreland is a federal narcotics agent with DEA. *JA 3.* At the time of the events in question, Agent Moreland had over sixteen months of specialized narcotics experience, including the prior six months where he investigated drug trafficking cases at BWI Airport as a member of a joint federal and state task force. *JA 12*. Agent Moreland is no stranger to law enforcement nor its commitment to upholding public safety, having served as a Baltimore police officer for four years prior to joining DEA. *JA 3*.

On September 15, 2019, Agent Moreland was on duty when he received an anonymous tip describing a man arriving to BWI on a morning flight from Dallas smuggling cocaine in a backpack. *JA 3*, *22*. The tipster described knowing the suspect socially and attending a party with him the previous night. At the party, the suspect had shared his plan with multiple people to smuggle cocaine on the flight to BWI the next day, describing his method of packing drugs in his backpack to avoid detection as well as his clientele in Baltimore. *JA 22*. The tip further described the suspect as a black male that resembled the Mayor of Dallas and went by the nickname "Stringer." *Id.* The tip also mentioned the suspect could be identified by the ubiquity of the Dallas Cowboys gear he wore, describing the likely attire as a shirt and a cap. *Id.*

Per his training as a narcotics investigator, Agent Moreland attempted to corroborate the tip's information. *JA 5.* He observed a morning flight from Dallas that arrived at BWI around 1:00 pm, matching the time frame given by the tipster. *Id.* Agent Moreland identified only one individual, the defendant Mr. Bell, that matched the tip's description. The defendant was a black male whose facial

features and age bore some resemblance to the tipster's Mayor of Dallas description. *JA 13.* The defendant also wore a Cowboys shirt and carried a backpack with a Cowboys logo. *JA 6.*

Agent Moreland attempted to further corroborate the tip while the defendant was in line at an airport convenience store. *JA 7.* During a brief conversation Agent Moreland struck up about the Cowboys, the defendant claimed he was in Baltimore to visit his grandmother and did not know when he was returning to Dallas. *Id.* Agent Moreland subsequently confirmed he was known primarily by a nickname. *JA 8.* When he attempted to verify the nickname, the defendant's appearance visibly changed, and he aggressively asked Agent Moreland to identify himself. *Id.* When Agent Moreland disclosed he was a DEA agent, the defendant abruptly stopped talking, exited the line after paying for his purchase, and hurriedly left the area. *Id.*

Agent Moreland followed the defendant as he moved towards baggage claim, observing him "walking quickly" and "weaving around people" as if he was in "a big hurry." *Id.* Agent Moreland saw the defendant look over his shoulder at least two times to see if he was being followed, nearly running into a woman with a stroller in his haste. *JA 9.* Agent Moreland additionally noticed he did not pick up any checked luggage. *Id.*

When the defendant looked over his shoulder a third time in the taxi line, he recognized Agent Moreland. *JA 10.* The defendant seemed "nervous and agitated," was "not making eye contact," and sweat profusely as Agent Moreland approached. *Id.* The defendant moved to get into a taxi, and Agent Moreland stopped him and asked for his full name and identification. *Id.* When Agent Moreland noticed multiple fraudulent driver's licenses containing the defendant's picture in his wallet, he arrested Mr. Bell for federal identity fraud. *Id.*

On February 10, 2021, the United States District Court for the District of Maryland granted the defendant's motion to suppress the discovery of the fraudulent driver's licenses on Fourth Amendment grounds but stayed its order pending appeal. *JA 24-25*.

SUMMARY OF THE ARGUMENT

This case concerns whether trained law enforcement officers can exercise their duty to stop the illegal trafficking of dangerous drugs by using reliable citizen tips and their own assessments of drug smuggling behavior developed from extensive field experience.

The anonymous citizen tip exhibited multiple characteristics of reliability and supplied a basis for Agent Moreland's reasonable suspicion to stop Mr. Bell. The tip contained significant, predictive detail about the defendant's travel itinerary, which Agent Moreland corroborated, along with key aspects of the defendant's identity and appearance. The tipster described how they knew the defendant and detailed his plan to smuggle cocaine through BWI Airport, establishing a strong basis of knowledge for the tip's allegation of drug trafficking.

Independent of the anonymous tip, Agent Moreland's assessment of the defendant's suspicious acts and behavior supported a stop. Agent Moreland's specialized narcotics training and substantial law enforcement experience informed his observations of the defendant's activities. The defendant abruptly and quickly left the area after learning of Agent Moreland's identity and wildly weaved through crowds while repeatedly looking back to see if he was followed. The defendant did not pick up any luggage despite claiming the reason for his visit was an open-ended stay to see his grandmother. Finally, the defendant displayed visible signs of nervous behavior while attempting to flee the airport. Although capable of construing innocently on their own, these facts viewed together by a trained agent indicate a reasonable suspicion of illegal activity. When bolstered further by a significantly corroborated tip detailing the illegal activity of the defendant, Agent Moreland was justified in stopping Mr. Bell based on the totality of the circumstances. Accordingly, the United States asks you to reverse the district court's decision to suppress evidence.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review for considering a motion to suppress evidence on appeal is review of a district court's factual findings for clear error and its legal determinations *de novo*. *United States v. Perkins*, 363 F.3d 319, 320 (4th Cir. 2004).

II. AGENT MORELAND HAD REASONABLE SUSPICION OF THE DEFENDANT'S ILLEGAL ACTIVITY TO JUSTIFY AN INVESTIGATORY STOP BASED ON THE TOTALITY OF THE CIRCUMSTANCES

Agent Moreland corroborated significant details of an anonymous tip alleging the defendant was smuggling illegal drugs and observed a series of nervous and evasive behaviors by the defendant that warranted a minimally intrusive stop. Consistent with the Fourth Amendment, an officer may conduct a brief investigatory stop if there is a "reasonable, articulable suspicion that criminal activity is afoot." *See Illinois v. Wardlow*, 528 U.S. 119, 123 (2000); *Perkins*, 363 F.3d at 321. Reasonable suspicion is not assessed by analyzing individual facts that may have innocent explanations on their own, but on the "totality of the circumstances" observed by a trained officer. *See Illinois v. Gates,* 462 U.S. 213, 231 (1983).

Reasonable suspicion can be based on an anonymous tip that provides sufficient, verifiable information about the suspect and crime to demonstrate its reliability to an officer. *See Alabama v. White*, 496 U.S. 325, 330 (1990). Observations of suspicious behavior made by a trained officer can also independently justify reasonable suspicion. *See United States v. Sokolow*, 490 U.S. 1, 2 (1989). Agent Moreland's corroboration of material aspects of the anonymous tip and observations of the defendant's suspicious behavior informed by his specialized narcotics experience amounted to reasonable suspicion and warranted the brief stop.

A. The anonymous tip possessed multiple indicators of reliability to establish a basis for reasonable suspicion.

Agent Moreland justifiably relied on an anonymous tip bearing numerous markers of trustworthiness. Anonymous information is well-established as a grounds for an investigatory stop if it

exhibits "sufficient indicia of reliability." *See White*, 496 U.S. at 332. Courts have consistently identified certain factors that support the overall reliability of an anonymous tip. *See Gates*, 462 U.S. at 233.

A tip is reliable if it contains predictive information and detail about the individual and alleged criminal activity, which are at least partially corroborated by an officer. *See White*, 496 U.S. at 331. Additionally, an informant's basis of knowledge lends "significant support to the tip's reliability." *See Navarette v. California*, 572 U.S. 393, 399 (2014). Agent Moreland corroborated the tip's predictions of the defendant's travel itinerary and key identifying features of his appearance. Combined with the tipster's detailed basis for this information, the tip is a reliable means to establish reasonable suspicion.

1. Agent Moreland corroborated significant predictive information and key identifying details of the tip.

Agent Moreland verified the tip's predictions of the defendant's travel itinerary and specific features of the defendant's identity and attire, demonstrating the tip's reliability. The independent corroboration of "significant aspects of an informer's predictions" that are not easily predicted impart some degree of reliability to a tip's other allegations. *See White*, 496 U.S. at 331-32. The presence of detail about the individual and alleged criminal activity further increases the tip's reliability. *See United States v. Elston*, 479 F.3d 314, 318 (4th Cir. 2007).

In *White*, the Supreme Court found officers had reasonable suspicion to stop a suspected cocaine smuggler after corroborating certain predictive and seemingly innocent details. *See White*, 496 U.S. at 331-32. The anonymous tipster told the police that a woman would drive from a particular apartment building to a particular motel within a specified timeframe and described certain identifying features of the vehicle. *See id.* The tipster also asserted that the woman would be transporting cocaine in a brown bag. *See id.* Within the timeframe identified, the officers corroborated the description of the vehicle, the location, and the presumed route to the motel before stopping the suspect. *See id.* Although the officers did not identify the bag allegedly containing cocaine, the Court found that the predictive facts the officers did corroborate—the defendant's travel itinerary and key identifying features—allowed a reasonable

inference that the tipster knew about the suspect's illegal activity because "only a small number of people … are privy to an individual's itinerary." *See id.* at 332.

Like the tip in *White* that accurately predicted the defendant's location, route and time frame of travel, the tip here accurately predicted the defendant would be arriving at BWI Airport on a morning flight from Dallas. *See id.* at 331-32. The tip also gave identifying details that Agent Moreland corroborated, including the defendant's physical appearance and likeness, the Cowboys gear he could be identified with, and that he was known primarily by a nickname.

Agent Moreland additionally verified the presence of the defendant's backpack allegedly transporting cocaine before making a stop, an analogous fact that even officers in *White* did not corroborate before their stop. *See id.* Although Agent Moreland acknowledged the shortcomings of the Mayor of Dallas comparison and could not confirm the defendant's specific nickname, the Court's precedents demonstrate reasonable suspicion does not require 100 percent verification of the tip. *See id.* Rather, reasonable suspicion is met when an officer corroborates significant aspects of a tip's predictions and key identifying details that, when viewed together, give credence to the tip's allegations of illegality. *See id.* Agent Moreland's corroboration of predictive travel itinerary information and details of the defendant's appearance and attire made the tip's allegation of illegality reliable.

2. The tipster shared a detailed basis of knowledge for their information.

[Omitted for space]

B. Agent Moreland's trained assessment of the defendant's suspicious activities and behavior warranted the stop.

Agent Moreland's experience and training informed his observations of the defendant's suspicious actions at the airport. Law enforcement officers are trained to make inferences from observable facts that, while appearing meaningless to untrained eyes, can warrant reasonable suspicion. *See United States v. Cortez*, 449 U.S. 411, 419 (1981); *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000). Agent Moreland's narcotics experience clued him into recognizing the defendant's evasive acts in the airport and nervous behavior at the taxi stand as indicators of reasonable suspicion.

1. Agent Moreland's narcotics training and experience require deference.

[Omitted for space]

2. Agent Moreland's observations of the defendant's nervous and evasive behavior indicated reasonable suspicion.

Agent Moreland's trained observations of the defendant's behavior at the airport, including his nervous and evasive acts, was sufficient to establish reasonable suspicion of the defendant's illegal activity. Courts have recognized common indicators of drug trafficking that, when observed by an experienced agent, provide evidence of reasonable suspicion. *See United States v. Sokolow*, 490 U.S. 1, 10 (1989). The factors include a suspect who does not check luggage at an airport, indicating their intention to return shortly after trafficking drugs to a new location; walks quickly or hurriedly—especially in the presence of law enforcement; and appears nervous or excessively sweats in front of an officer. *See, e.g., Florida v. Rodriguez*, 469 U.S 1, 3 (1984); *United States v. Harrison*, 667 F.2d 1158, 1161 (4th Cir. 1982); *United States v. Mason*, 628 F.3d 123, 129-30 (4th Cir. 2010).

In *Harrison*, the Fourth Circuit found DEA agents had reasonable suspicion to stop a drug smuggling suspect after solely observing the defendant's behavior at an airport. *See Harrison*, 667 F.2d at 1161. The suspect had no checked luggage, and upon noticing an agent observing him, made a "peculiar head motion" and started walking "very quickly" through the airport. *See id.* at 1159. The suspect further appeared "nervous and fidgety" when approached by the agent in the taxi line. *See id.* at 1160. The court acknowledged that while any of the facts alone would not amount to reasonable suspicion, these indicators observed collectively by a trained agent justified the stop. *See id.* at 1161.

Like the suspect in *Harrison*, the defendant in this case exhibited multiple suspicious behaviors once he became aware that a federal agent was observing him. *See id.* The defendant abruptly stopped speaking to Agent Moreland, walked hurriedly, and weaved through crowds as he motioned his head back and forth to see if he was being followed. The defendant had no checked luggage, despite his claim of an open-ended stay in Baltimore. Finally, as Agent Moreland approached him in the taxi stand, he avoided eye contact, appeared "nervous and agitated" and sweat profusely. Although the defendant's individual

behaviors could be construed innocently in isolation, they amount to reasonable suspicion of illegal activity when viewed in their totality.

C. Agent Moreland had reasonable suspicion to justify a stop based on the totality of circumstances.

Agent Moreland's corroboration of significant aspects of an anonymous tip alleging illegal drug smuggling and his own observations of the defendant's suspicious behavior amounted to reasonable suspicion. "The totality of the circumstances must be evaluated to determine the probability, rather than the certainty, of criminal conduct." *United States v. Sokolow*, 490 U.S. 1, 2 (1989). The Court's precedents demonstrate that officers can stop individuals "to resolve ambiguities in their conduct" and even "accepts the risk that officers may stop innocent people." *See Illinois v. Wardlow*, 528 U.S. 119, 120 (2000). Although individual acts in isolation may appear "quite consistent with innocent travel," they can "amount to reasonable suspicion that criminal activity was afoot" when viewed together by a trained agent. *See Sokolow*, 490 U.S. at 2.

The tip's accurate predictions of the defendant's travel itinerary, the corroboration of substantial aspects of the defendant's identity and appearance, and the tipster's basis of knowledge may have warranted reasonable suspicion on its own. Agent Moreland, however, continued to investigate for further indicators of suspicious behavior. Agent Moreland observed the defendant's evasive movements upon learning of the presence of law enforcement, noticed he did not pick up any luggage, and recognized the defendant's "nervous and agitated" demeanor and profuse sweating as he approached. Only then did Agent Moreland stop the defendant for his identification. Based on the totality of circumstances, Agent Moreland had reasonable suspicion of the defendant's illegal activity to justify an investigative stop.

CONCLUSION

For the foregoing reasons, the district court's decision to suppress evidence should be reversed.

Mohammed Al-Shawaf, Counsel for Appellant

Applicant Details

First Name	**Josh**
Last Name	**Almond**
Citizenship Status	**U. S. Citizen**
Email Address	**jalmond@unc.edu**
Address	**Address** Street **203 Conner Dr., Apt 5** City **Chapel Hill** State/Territory **North Carolina** Zip **207514** Country **United States**
Contact Phone Number	**2405435712**

Applicant Education

BA/BS From	**James Madison University**
Date of BA/BS	**May 2021**
JD/LLB From	**University of North Carolina School of Law** **https://law.unc.edu/**
Date of JD/LLB	**May 11, 2024**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**North Carolina Banking Institute Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Broome, Lissa
lbroome@email.unc.edu
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Brinkley, Martin
martin92@unc.edu
Gerhardt, Deborah
dgerhardt@unc.edu
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

JOSHUA ALMOND

jalmond@unc.edu • (240) 543-5712
Current Address: 203 Conner Dr. Apt 5, Chapel Hill, NC 27514
Permanent Address: 305 Bridle Crest Sq. NE, Leesburg, VA 20176

June 12, 2022

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year law student at the University of North Carolina School of Law seeking a clerkship position for the 2024-2025 term. As a native Virginian born in Chesapeake and raised in Leesburg, I am interested in retuming to Virginia to practice law and give back to the community that shaped me as a person. My experience as the Editor-in-Chief of the North Carolina Banking Institute Journal and my standing within the top 15% of my class demonstrates my ability to succeed in a clerkship position.

As the Editor-in-Chief of the North Carolina Banking Institute Journal, I have coordinated an entire year of programming to successfully publish our upcoming volume. This includes soliciting and editing professional articles, grading applications for staff membership, and organizing our yearly "Banking Institute," a CLE program held in Charlotte, North Carolina for several hundred attorneys. This experience demonstrates my time management and leadership skills, in addition to my sharp legal writing and research skills, preparing me well for a clerkship position.

Further, the training I have received from the attorneys at Potter Anderson & Corroon in Wilmington, Delaware has been immensely helpful thus far this summer. I have reviewed numerous Court of Chancery complaints and briefs, learning from experienced litigators about how to be a successful writer within a prestigious jurisdiction. These same skills would readily apply to this clerkship position.

Further materials are attached to this application, and if any other documents are requested, I can have them supplied as soon as possible. I welcome the opportunity to speak with you about a clerkship position and can be reached at 240-543-5712 or jalmond@unc.edu. Thank you for your time and consideration.

Sincerely,
/s/ Joshua Almond

JOSHUA ALMOND

jalmond@unc.edu ● (240) 543-5712
Current Address: 203 Conner Dr. Apt 5, Chapel Hill, NC 27514
Permanent Address: 305 Bridle Crest Sq. NE, Leesburg, VA 20176

EDUCATION

University of North Carolina School of Law | Chapel Hill, North Carolina
Juris Doctor, expected May 2024
GPA: 3.755 (Top 15%)

- *North Carolina Banking Institute Journal,* Editor-in-Chief, Vol. 28, Published Note in Vol. 27
- Certificate of Merit Recipient, Earned the Highest Grade in both Copyright and Corporations Courses
- Eugene Gressman & Daniel H. Pollitt Oral Advocacy Award Recipient
- Marion A. Cowell, Jr. Scholarship Recipient
- Transactional and Corporate Law Association, President
- Honors Writing Scholar, assists in the instruction of first-year writing and research coursework

James Madison University | Harrisonburg, Virginia
Bachelor of Music, Music Industry, *summa cum laude*, May 2021
GPA: 3.912

- Elected by University Faculty as the 2021 School of Music Outstanding Graduate
- Teaching Assistant for the "Legal Aspects of the Music Industry" Class
- Phi Kappa Phi Honor Society
- Selected for the Truist Emerging Leader Certification

EXPERIENCE

Potter Anderson & Corroon LLP | Wilmington, Delaware
Summer Associate, Summer 2023

The Regulatory Fundamentals Group LLC | New York, New York (Remote)
Legal Intern, Summer 2022

- Directly assisted the company CEO by researching and analyzing financial regulations and the rapidly changing investment landscape through legal memoranda, frequently collaborating with industry professionals from universities and law firms to assist in research
- Maintained a database of financial regulations used to consult clients on their specific regulatory needs
- Prepared a private equity fund financing white paper used to educate clients on fund loan implications

Dean Martin Brinkley, University of North Carolina School of Law| Chapel Hill, North Carolina
Legal Research Assistant, Summer 2022

- Conducted and synthesized legal and historical research regarding the financial history of the University of North Carolina and drafted legal memoranda for the Dean of UNC Law School
- Completed administrative tasks involving the Dean's preparation for his Legal History course

Brevard Music Center | Brevard, North Carolina
Business Administrative Associate, Summer 2021

- Assisted the Chief Financial Officer, Operations Manager, and Accounting Manager in administrative duties, employee onboarding of over 150 individuals, and daily accounting journal entries respectively
- Managed point-of-sale software and structured company sales processes for over 50 summer events
- Established and managed dozens of business relationships with product distributors and service providers

Loudoun County Public Schools, Freedom High School | South Riding, Virginia
Music Instructor, June 2017 - Present

- Designs the school's marching band program and helps instruct the marching and concert ensembles

INTERESTS

Classical Music; Classically Trained French Horn Player; and 2016 Drum Corps International World Champion

UNC SCHOOL OF LAW

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SCHOOL OF LAW

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Unofficial Transcript

Note to Employers from the Career Development Office: Grades at the UNC School of Law are awarded in the form of letters (A, A-, B+, B-, C, etc.). Each letter grade is associated with a number (A = 4.0, A- = 3.7, B+ = 3.3, B = 3.0, etc.) for purposes of calculating a cumulative GPA. An A+ may be awarded in exceptional situations. For more information on the grading system, including the current class rank cutoffs, please contact the Career Development Office at (919) 962-8102 or visit our website at https://law.unc.edu/careers/for-employers/grading-policy-faq/

Student Name: Joshua Almond

Cumulative GPA: 3.755

Class	Description	Units	Grading	Grade	Grade Points
LAW 201	CIVIL PROCEDURE	4.00	Law - graded	**A-**	14.800
LAW 205	CRIMINAL LAW	4.00	Law - graded	**A**	16.000
LAW 209	TORTS	4.00	Law - graded	**A-**	14.800
LAW 295	RES,REAS,WRIT,ADVOC I	3.00	Law - graded	**B+**	9.900

Class	Description	Units	Grading	Grade	Grade Points
LAW 204	CONTRACTS	4.00	Law - graded	**A-**	14.800
LAW 207	PROPERTY	4.00	Law - graded	**B+**	13.200
LAW 234A	CONSTITUTIONAL LAW	4.00	Law - graded	**A**	16.000
LAW 296	RES,REAS,WRIT,ADVOC II	3.00	Law - graded	**A-**	11.10

Class	Description	Units	Grading	Grade	Grade Points
LAW 210	COPYRIGHT LAW	3.00	Law - graded	**A+**	12.900
LAW 211	TRADEMARK LAW	3.00	Law - graded	**A-**	11.100
LAW 242	EVIDENCE	4.00	Law - graded	**A**	16.000
LAW 280	INCOME TAXATION	4.00	Law - graded	**A-**	14.80

Class	Description	Units	Grading	Grade	Grade Points
LAW 228	BUSI ASSOCIATIONS	4.00	Law - graded	**A+**	17.200
LAW 250	INSURANCE & DISASTER LAW	3.00	Law - graded	**B+**	9.900
LAW 266P	THE LAW FIRM	3.00	Law - graded	**B+**	9.900
LAW 542	LEGAL CRISIS MANAGEMENT	2.00	Law - graded	**A-**	7.400
LAW 551	LEGAL RESPONSE FINANC. CRISES	2.00	Law - graded	**A**	8.000

Total Grade Points	217.800
/ Units Taken Toward GPA	58.000
= GPA	**3.755**

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is my pleasure to write on behalf of Joshua Almond, whom I understand has applied for a clerkship with you following his graduation from UNC School of Law in May 2024. I know Josh as a staff member of the *North Carolina Banking Institute* journal, for which I am the faculty advisor, and as the Editor-in-Chief for the coming year. Josh also recently received the Marion A. Cowell, Jr. Scholarship, awarded to the rising 3L on the journal who has provided the greatest dedication to the journal. Although all ten of our rising editors receive scholarships in the amount of $10,000, this scholarship is one of the first two selected out of the ten (the second scholarship has a need component) and is an honor to receive.

As Josh's academic record demonstrates, he is an excellent student. He graduated summa cum laude from his undergraduate institution and has earned very high grades in law school. In fact, his current 3.75 GPA is very close to the GPA mark for the top 10% of his class at the end of the Spring 2023 semester, which was 3.776.

Maybe even more important for a judicial clerk is the ability to research, write, and make sense of complex topics. Josh developed his own topic for his journal note, which was recently published, on fraud in fund finance subscription facilities. With very little guidance from me, he was able to explain a sophisticated financing arrangement quite clearly and offer some nuanced suggestions for increased due diligence to avoid fraud in the future. I was very impressed.

To round it all out, Josh served this year as President of the law school's Transaction and Corporate Law Association, a large group of students. Josh has been helpful and professional when I have asked him for help in promoting our Center's events to TCLA.

Josh would be a wonderful addition to any office environment. He is pleasant, hard-working, respectful, and a great contributor to anything he undertakes. Josh has my highest recommendation and would make an excellent law clerk. Please contact me if I may provide any additional information (lbroome@email.unc.edu or 919-962-7066).

Best,

Lissa L. Broome

Burton Craige Distinguished Professor
Director, Center for Banking and Finance

February 7, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

With great pleasure and enthusiasm, I recommend my student Joshua Almond for a clerkship in your chambers.

Since he arrived at the Law School, I have come to know Josh both as an outstanding law student and as a wonderful human being. He served as one of my research assistants last summer, assisting me with a long term research project having to do with the financing of the University of North Carolina prior to the Civil War. He was an excellent colleague on an abstruse subject, a good and clear writer, and a thoughtful and creative critic of our work.

I presently have the honor of teaching Josh along with approximately 80 students in a four-hour course in Business Associations, which is taken by nearly every UNC Law School student. Josh is a joy to have in class. He brings a keen interest in corporate law, as his law review note for the *North Carolina Journal of Banking Law* reflects.

Finally, Josh and I have collaborated as musicians in a chamber ensemble, he on French horn and I on oboe. He is a terrific player and a sensitive musician. We have worked together on a trio by the 19th century German composer Carl Reinecke with a pianist friend of mine. We hope to perform this piece sometime in the course of the spring. The preparation of a work of chamber music is similar in many ways to the relationship between law clerks in a judge's chambers and with the judge himself or herself. As a former law clerk to Chief Judge Sam J. Ervin, III of the Fourth Circuit, who valued collegiality and camaraderie in his law clerks exceedingly, I can attest that Josh will fit in with others in your chambers and will serve you splendidly in the substantive part of your work.

Please let me know if I can answer any further questions about Josh. It would be my pleasure to speak to you by phone if it would be helpful to you.

Sincerely,

Martin H. Brinkley

Dean
William Rand Kenan, Jr. Distinguished Professor

Martin Brinkley - martin92@unc.edu

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to share my strongest recommendation of UNC law student, Joshua Almond, for a clerkship with your Court. Josh is an exceptional student. He stood out from his excellent peers by demonstrating a passionate interest in learning every day. Last fall, Josh took both my Trademark and Copyright Law classes. He earned the very highest grade in Copyright Law and his exam was among the top five in trademark law. Perhaps more importantly, every day, Josh came to class organized, prepared, and engaged. I cannot think of a single instance when he disappointed me. I call on students frequently, and Joshua was always prepared and answered thoughtfully. His participation meaningfully contributed to what all the students in those classes learned.

Josh stood out for another reason. He was generous with his time and incredibly helpful to his peers, taking time to assist other students who found the material more challenging.

Josh's background in classical music helped him develop an exceptional work ethic and attention to detail. Another great benefit Josh acquired from this discipline is the ability to accept constructive advice and adapt his approach to find a better solution. I assigned a group take home project that very few, if any, students tackle well on the first effort. Joshua's first draft was good, but the way his team took my comments and integrated them to advance the final project showed his willingness to think through constructive advice and integrate it into his work product.

As a former law clerk, I know how important it is for you to find a trustworthy and dedicated candidate to support your work. If I were a judge looking for a law clerk, Josh would be among the first young lawyers I would call. In addition to his many academic strengths and work ethic, Josh has an easy-going personality and a wonderful sense of humor. If you are looking for a clerk who will do meticulous work, is eager to serve and passionate about learning, I am confident you will be grateful to have chosen Josh.

Please feel free to contact me at (919) 357-4316 or dgerhardt@unc.edu if I can provide you with any additional information about this most worthy candidate.

Sincerely yours,

Deborah R. Gerhardt
Professor of Law

JOSHUA ALMOND
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Writing Sample Cover Sheet

This writing sample is excerpted from my final written assignment for the course "Legal Response to Financial Crisis." The paper was reviewed once by the course professor and once by another student. The rest of the editing was conducted independently outside of those two initial reviews.

This excerpt includes the background facts and primary argument of the paper. Omitted is the section applying my argument to a real-life scenario and rebutting possible challenges to the argument. Upon request, the full paper can be provided.

FinTech Fiasco: An Approach to FDIC Misrepresentation Prevention Through the Lens of the Lanham Act

I. INTRODUCTION

In the financial industry, confidence is the key ingredient to a healthy banking system, and subsequently a healthy economy.[1] For example, banks will borrow from clients through demand deposits, meaning that the depositors can withdraw their cash whenever they choose.[2] The bank will then lend out those deposits for a longer term to make a profit from the interest on the loan.[3] This process of "borrowing short" and "lending long" allows for the efficient use of money in our economy because deposits that would ordinarily sit and do nothing can contribute to societal development.[4] None of this would be possible if customers were not confident in their bank to safely hold their money and give them access to their cash when necessary.[5]

Enter the Federal Deposit Insurance Corporation ("FDIC"). To help maintain public confidence in the banking system, customer deposits of up to $250,000 in FDIC-member banks are insured by the FDIC, protecting their deposits in the case of the bank's failure.[6] This insurance allows depositors to feel comfortable lending their money to an FDIC-member institution, and so far, no covered depositor has ever lost a penny.[7]

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[1] *See* Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis*, 13 N.C. BANKING INST. 5, 12 (2009) ("Perhaps the most dangerous consequence of this economic crisis is that our collective confidence in our nation's future, the economy's resilience, our productivity and entrepreneurial spirit, and our ability to achieve the widely sought after American dream has been badly shaken and tarnished to a significant degree.").

[2] *See* William Bednar & Mahmoud Elamin, *Rising Interest Rate Risk at US Banks*, ECONOMIC COMMENTARY, https://www.clevelandfed.org/publications/economic-commentary/2014/ec-201412-rising-interest-rate-risk-at-us-banks ("Banks borrow short and lend long. They often borrow, for example, by taking demand deposits, such as checking and savings deposits, which must be paid back whenever depositors ask for them. On the other hand, most of the money they lend out is tied up in long-term loans, such as mortgages.").

[3] *Id.*

[4] *See What is the Economic Function of a Bank?*, FED. RESERVE BANK OF S. F. (July 2001), https://www.frbsf.org/education/publications/doctor-econ/2001/july/bank-economic-function/ (explaining how banks lend to financial institutions, individuals, or governments who need the money for investments or other purposes).

[5] *See* John C. Dugan, *Addressing the Fundamental Banking Policy Problem of Runs: Effectively Subordinating Large Amounts of Long-Term Debt to Short-Term Debt to End "Too-Big-to-Fail"*, 22 N.C. BANKING INST. 11, 16 (2018) (explaining how prudential regulation is intended to promote confidence in banks and the banking system).

[6] *About*, FDIC, https://www.fdic.gov/about/ (last visited Feb. 26, 2023).

[7] *Id.*; *Symbol of Confidence*, FDIC (last visited Feb. 26, 2023), https://www.fdic.gov/consumers/assistance/protection/depaccounts/confidence/symbol.html.

However, as technology continues to drive significant change in the financial industry, the FDIC-insured status of some financial institutions has become ambiguous.[8] For example, cryptocurrency exchanges continue to make statements regarding the FDIC-insured status of certain products and accounts.[9] In reality, these cryptocurrency exchanges are not FDIC-insured institutions, and their accounts and products are not insured.[10]

To mitigate this confusion, the FDIC relies on Section 18(a)(4) of the Federal Deposit Insurance Act entitled "False Advertising, Misuse of FDIC Names, and Misrepresentation to Indicate Insured Status."[11] Further, the FDIC released a regulation with additional guidance regarding the misrepresentation of statements involving FDIC-insured partner institutions, motivating financial technology companies ("FinTechs") to be unquestionably clear about their insured status.[12] Even with this current regulatory scheme, crypto exchanges and other FinTechs are still confusing customers regarding their insured status.[13]

This note analyzes a novel approach to enforcing FDIC-related false advertising and misrepresentation. Because the FDIC monitors the use of its name to reduce consumer confusion and keep uninsured institutions from trading off their goodwill,[14] applying a regulatory scheme that reflects federal trademark law may provide the FDIC with a more expansive enforcement mechanism. This paper addresses registration of the marks "Federal Deposit Insurance Corporation" and "FDIC" as word marks, and the official FDIC sign as a design mark. By treating these as trademarks, the FDIC could bring broad claims against infringers who either confuse consumers or dilute the FDIC's reputation in the public's

[8] *See* Saule T. Omarova, *Dealing with Disruption: Emerging Approaches to Fintech Regulation*, 61 WASH. U. J.L. & POL'Y 25, 34 (2020) ("By putting increasing pressure on the existing regime of financial regulation and supervision, the rise of fintech exposed the need for revisiting the broader regulatory philosophy underlying and guiding that regime.").

[9] *See* Weiner Brodsky Kider PC, *FDIC Issues Cease and Desist Letters for Deposit Insurance Misrepresentations*, JD SUPRA (Mar. 9, 2023), https://www.jdsupra.com/legalnews/fdic-issues-cease-and-desist-letters-5434397/ (explaining the most recent release of cease and desist letters sent to cryptocurrency exchanges and other websites making misrepresentations).

[10] *Id.*

[11] Federal Deposit Insurance Act § 2[18], 12 U.S.C. § 1828(a)(4).

[12] Advertisement of Membership, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo, 12 C.F.R. § 328.2(a)(3) (2022).

[13] Weiner Brodsky Kider PC, *supra* note 9.

[14] *See Symbol of Confidence*, *supra* note 7 (emphasizing that all deposits are "backed by the full faith and credit of the United States government").

eyes.[15] Additionally, enforceability against impermissible use would replace the current knowledge-based scienter requirement with a quasi-strict liability test for infringement.[16]

This note proceeds in five parts. Part II analyzes the application and effectiveness of the current regulatory scheme for FDIC false advertising and misrepresentation, particularly involving FinTechs.[17] Part III examines the differences between a potential trademark-based enforcement scheme and the current regulatory scheme.[18] Part IV analyzes the effect of the proposed scheme on FinTechs that the FDIC is currently pursuing.[19] Part V presents the conclusion.[20]

II. BACKGROUND

Although the FDIC was created by the Banking Act of 1933,[21] all current legislation governing the operation of the FDIC is housed in the Federal Deposit Insurance Act of 1950.[22] Seven factors are listed in Section 6 of the Federal Deposit Insurance Act to determine if a depository institution qualifies for FDIC insurance.[23] This includes (1) the financial history and condition, (2) adequacy of the capital structure, (3) future earnings prospects, (4) general character and fitness of management, (5) risk to the deposit insurance fund, (6) convenience and needs of the community to be served, and (7) consistency of

[15] *See* Lanham Act § 32(1)(a), 15 U.S.C. § 1114(1)(a) (listing the basis for the trademark infringement claim); *id.* § 1125(c) (listing the basis for the trademark dilution claim).

[16] *See* Travis R. Wimberly & Giulio E. Yaquinto, *The Infringer's Mental State: Open Questions for Trademark Litigants*, AM. BAR. ASS'N. (Jun. 30, 2021), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide-extra/infringer-mental-state/ ("Liability requires only that the infringer's conduct created a "likelihood of confusion" among consumers, after all.").

[17] *See infra* Part II.

[18] *See infra* Part III.

[19] *See infra* Part IV.

[20] *See infra* Part V.

[21] *See* Banking Act of 1933, ch. 89, 48 Stat. 162 (codified at 12 U.S.C. § 227) (demonstrating how the FDIC was created through this act, but was later reorganized under the Federal Deposit Insurance Act of 1950).

[22] *See* Federal Deposit Insurance Act § 2[1], 12 U.S.C. § 1811 ("There is hereby established a Federal Deposit Insurance Corporation . . . which shall insure, as hereinafter provided, the deposits of all banks and savings associations which are entitled to the benefits of insurance under this chapter, and which shall have the powers hereinafter granted.").

[23] *Id.* § 1816.

corporate powers with the FDI Act.[24] The bank will qualify for FDIC insurance if these factors are resolved favorably towards the depository institution.[25]

If the depository institution qualifies for FDIC member status, it must display the FDIC official sign by twenty-one days after the institution became insured.[26] In addition, the short title "Member of FDIC" or "Member FDIC," or the official sign of the corporation must be included in all advertising "that either promote[s] deposit products and services or promote[s] non-specific banking products and services offered by the institution."[27] Advertising the insured status of the depository institution serves the FDIC's primary policy goal, instilling confidence in the financial system.[28]

A. False Advertising and Misrepresentation

If a financial institution falsely advertises or misrepresents its insured status, the FDIC may bring an enforcement action against the institution under Section 18(a)(4) of the Federal Deposit Insurance Act.[29] Specifically, this section prohibits financial institutions from falsely implying or representing that the FDIC insures them by using the official sign or the term "Federal Deposit," "Federal Deposit Insurance," or "Federal Deposit Insurance Corporation" in any part of the business name or advertising.[30] Additionally, the institution may not "knowingly" misrepresent that a deposit is insured or the extent or manner to which an obligation is insured.[31]

In addition to this statute, the FDIC issued a regulation that details prohibitive behavior for financial institutions using the FDIC name or logo and making representations about their insurance

[24] *Id.*; FED. DEPOSIT INS. CORP., APPLYING FOR DEPOSIT INSURANCE: A HANDBOOK FOR ORGANIZERS OF DE NOVO INSTITUTIONS, DIVISION OF RISK MANAGEMENT SUPERVISION 23 (2017) https://www.fdic.gov/regulations/applications/handbook.pdf [hereinafter "FDIC HANDBOOK"].

[25] *See* FDIC HANDBOOK, *supra* note 26, at 23 (detailing exactly how each factor can be resolved in favor of insuring a bank).

[26] Advertisement of Membership, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo, 12 C.F.R. § 328.2(a)(3) (2022).

[27] *Id.* § 328.2(b)(1), (c)(1).

[28] *See About*, FDIC, https://www.fdic.gov/about/ (last visited Mar. 8, 2023) ("The Federal Deposit Insurance Corporation (FDIC) is an independent agency created by the Congress to maintain stability and public confidence in the nation's financial system.").

[29] Federal Deposit Insurance Act § 2[18], 12 U.S.C. § 1828(a)(4)(C)-(E).

[30] *Id.* § 1828(a)(4)(B).

[31] *Id.* § 1828(a)(4)(C).

status.[32] The regulation extends to any person who (1) "[f]alsely represents, expressly or by implication, that any deposit liability, obligation, certificate, or share is FDIC-insured by using the FDIC's name or logo;" (2) "[k]nowingly misrepresents, expressly or by implication, that any deposit liability, obligation, certificate, or share is insured by the FDIC if such an item is not so insured;" (3) [k]nowingly misrepresents, expressly or by implication, the extent to which or the manner in which any deposit liability, obligation, certificate, or share is insured by the FDIC, if such an item is not insured to the extent or manner represented;" or (4) "aids and abets" anyone covered in the above three sections.[33] Significantly, the regulation explains that an omission by a financial institution that may lead a reasonable consumer to believe a misrepresentation can also result in liability.[34] This includes omitting the identity of any insured depository institution with which the FinTech directly or indirectly has a business relationship or omitting the limit to which deposits are insured.[35] The representation made by an institution must also be material, generally meaning that it either states that certain non-insurable products are insured, that the institution is insured when it is not, or that the amount of insurance is different from what is actually provided.[36]

Notably, the statute and the regulation specifically focus on using the FDIC name and official sign to falsely represent or imply insurance status, and knowingly misrepresenting its insurance status or the extent of its insurance.[37] These two prohibitions will be the primary focus of an improved regulatory scheme based on trademark law.

B. Problems Arising from FinTechs

Before its bankruptcy in November of 2022, the cryptocurrency exchange FTX US ("FTX") was sent a cease-and-desist letter from the FDIC claiming that it had made false and misleading statements in

[32] *See generally* Advertisement of Membership, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo, 12 C.F.R. § 328.100 (2022).
[33] *Id.* § 328.100.
[34] *Id.* § 328.102(b)(5)(A)-(D).
[35] *Id.*
[36] *Id.* § 328.102(b)(4)(i)-(iv).
[37] Federal Deposit Insurance Act § 2[18], 12 U.S.C. § 1828(a)(4)(B); 12 C.F.R. § 328.100.

violation of Section 18(a)(4) of the Federal Deposit Insurance Act.[38] Specifically, Brett Harrison of FTX represented on Twitter that "direct deposits from employers to FTX are stored in individual FDIC-insured bank accounts in the users' names and that "stocks are held in FDIC-insured and SIPC-insured brokerage accounts."[39] The FDIC responded to these representations, stating that they "contain false and misleading representations that uninsured products are insured by the FDIC," in addition to misrepresentations about the extent and manner of the insurance provided.[40] They also claim that Harrison had falsely implied that FTX was itself FDIC-insured, the brokerage accounts of FTX are insured, and that cryptocurrency can be FDIC insured.[41] Each of these implications were false.[42] Further, FTX failed to identify the banks that FTX had relationships with, directly or indirectly, for which consumer funds are deposited.[43]

Consequently, the FDIC demanded corrective action from FTX, including the following.[44] FTX shall remove all statements that explicitly or implicitly suggest that FTX is FDIC-insured, FTX brokerage accounts are FDIC-insured, any funds held as cryptocurrency are protected by FDIC insurance, and that FDIC insurance provides coverage in any manner and extent "other than those set forth in the Federal Deposit Insurance Act."[45] This includes scrubbing these statements from any website, including accounts on Twitter or other social media platforms, and any marketing or consumer-facing materials.[46] FTX must then submit written confirmation that all statements have been removed within 15 days.[47]

After the FDIC issued the cease-and-desist, Harrison and FTX founder Sam Bankman-Fried responded to the document through Twitter.[48] Bankman-Fried tweeted that "FTX does not have FDIC

[38] Letter from Seth P. Rosebrock, Assistant Gen. Couns., Enf't, Fed. Deposit Ins. Corp., to Brett Harrison, President, and Dan Friedberg, Chief Regul. Officer, FTX (Aug. 18, 2022) (on file with the FDIC) [hereinafter "FTX Letter"].
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *See* Kevin Helms, *FDIC Issues Crypto-Related Cease and Desist Orders to 5 Companies Including FTX US Exchange*, BITCOIN.COM (AUG. 20, 2022), https://news.bitcoin.com/fdic-issues-crypto-related-cease-and-desist-orders-to-5-companies-including-ftx-us-exchange/ ("Bankman-Fried apologized for the confusion regarding FDIC insurance on Twitter. 'Clear communication is really important; sorry!' he tweeted. 'FTX does not have FDIC insurance (and we've never said so on website etc.); banks we work with do.'").

insurance (and we've never said so on website etc.); *banks we work with do.*[49] In a way, Bankman-Fried responded to the cease-and-desist letter about misrepresenting statements with a statement that may still confuse depositors regarding the insured status of their accounts.[50]

Numerous other FinTechs have recently been the subject of FDIC false advertising and misrepresentation claims.[51] Gemini, a cryptocurrency exchange, misrepresented insurance status to customers who operate a Gemini "Earn" account, stating that funds would be protected in the case of a Gemini collapse.[52] Additionally, CEX.IO, another cryptocurrency exchange, was sent a cease and desist from the FDIC because of misrepresentations about the insured status of its fiat currency accounts.[53] This demonstrates the FDIC's commitment to protecting depositors, maintaining its well-respected name, and preventing an increasing number of infringers from misleading consumers.[54]

III. TRADEMARK-BASED ENFORCEMENT SCHEME

A. Trademark Law Background

In 1946, the Lanham Act was enacted to provide a statutory process of federally protecting a person's or other entities' trademarks.[55] Generally, a trademark is "any word, name, symbol, or device, or any combination thereof" used to identify and distinguish the goods of one person from those

[49] *Id.*

[50] *See id.* (suggesting that FTX's statements may be confusing to customers, and explaining how FTX apologized for causing any confusion through its advertising).

[51] Press Release, Fed. Deposit Ins. Corp., FDIC Issues Cease and Desist Letters to Five Companies For Making Crypto-Related False or Misleading Representations about Deposit Insurance (Aug. 19, 2022).

[52] Steve Kaaru, *Gemini Lied About FDIC Insurance in Emails to Earn Customers: Report*, COINGEEK (Feb. 3, 2023), https://coingeek.com/gemini-lied-about-fdic-insurance-in-emails-to-earn-customers-report/.

[53] Nelson Wang, *FDIC Tells Crypto Exchange CEX.IO to Stop Claiming US Dollars Held in Its Wallets Are Insured*, COINDESK (Feb. 15, 2023), https://www.coindesk.com/policy/2023/02/15/fdic-tells-crypto-exchange-cexio-to-stop-claiming-us-dollars-held-in-its-wallets-are-insured/.

[54] *See* Susan Seaman & Daniel Wilkinson, *Why Fintechs and Crypto Companies Should Pay Attention to the FDIC's Latest Round of Cease-and-Desist Letters*, HUSCH BLACKWELL (Feb. 22, 2023), https://www.huschblackwell.com/newsandinsights/why-fintechs-and-crypto-companies-should-pay-attention-to-the-fdics-latest-round-of-cease-and-desist-letters ("The FDIC's latest round of cease-and-desist letters follows another batch sent in August 2022 to five crypto-related companies including the now infamous FTX. At the time of the initial cease-and-desist letters, the FDIC had warned of an increase in deposit insurance misrepresentations that jeopardized the integrity of the FDIC insurance system and create consumer harm.").

[55] *See Lanham Act: Everything You Need to Know*, UPCOUNSEL TECH., https://www.upcounsel.com/lanham-act (last visited Mar. 25, 2023) ("The Lanham Act created a national trademark registration system. Enacted in 1946, this act also protects a trademark owner against others using similar marks.").

manufactured by others.[56] Notably, trademarks protect a company's brand, provide consumers with a method of identifying a product, and protect against counterfeiting and fraud.[57] Like the FDIC, an important policy rationale supporting trademark protection is giving customers confidence in the products they consume and keeping other companies from trading off the goodwill that an entity has garnered through its business.[58]

To protect a trademark, the mark must be "used in commerce" and "sufficiently distinctive."[59] The use in commerce requirement demands that the trademark applicant have a bona fide intent to use the mark in commerce, meaning all commerce that Congress may lawfully regulate.[60] For service providers, like the FDIC, a trademark satisfies this element when (1) the mark is "used or displayed in the sale or advertising of services" and (2) the services are "rendered in commerce" or "rendered in more than one State."[61] The distinctiveness requirement is prominently governed by the four-category system stemming from the decision *Abercrombie & Fitch Co. v. Hunting World, Inc.*, each resulting in a different level of protection for the mark.[62]

The four categories include marks that are generic, descriptive, suggestive, and arbitrary or fanciful.[63] A generic mark is a mark that automatically indicates the product that is provided by the company and may never qualify for trademark protection.[64] An example of a generic mark would be a bagel shop called "Bagels."[65] A descriptive mark describes the aspect of the goods without identifying the source

[56] Lanham Act § 45, 15 U.S.C. § 112.

[57] *What is a trademark?*, U.S. PAT. AND TRADEMARK OFF., https://www.uspto.gov/trademarks/basics/what-trademark (last visited Mar. 25, 2023).

[58] See *id.* (explaining the several reasons why trademark law protects both the business and the consumers).

[59] 15 U.S.C. § 1052(f) ("Except as expressly excluded in subsections (a), (b), (c), (d), (e)(3), and (e)(5) of this section, nothing in this chapter shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods in commerce.").

[60] *Id.* § 1127.

[61] Aycock Engineering, Inc. v. Airflite, Inc., 560 F.3d 1350, 1357 (Fed. Cir. 2009).

[62] *See* Abercrombie & Fitch Co. v. Hunting World, 537 F.2d 4, 9 (2d Cir. 1976) (explaining each category of trademark protection and the protection provided by each).

[63] *Id.*

[64] *See id.* ("A generic term is one that refers, or has come to be understood as referring, to the genus of which the particular product is a species. At common law neither those terms which were generic nor those which were merely descriptive could become valid trademarks, . . .").

[65] *See Generic Trademark: Everything You Need to Know*, UPCOUNSEL TECH., https://www.upcounsel.com/lanham-act (last visited Mar. 25, 2023) ("Generic trademarks are common terms used to name products or services, for example, a brand of shoes called 'shoes.'").

from which the goods come.[66] A descriptive trademark does not qualify for protection without "secondary meaning," also known as "acquired distinctiveness."[67] A descriptive mark may acquire distinctiveness if it has either become distinctive as to the source of the product or if the mark has been used consistently and exclusively for five years before registration.[68] An example of a descriptive mark would be an ice cream shop called "cold and creamy."[69] A suggestive mark is a mark that suggests the qualities of the product and requires consumers to put some thought into what product the company provides.[70] An example of a suggestive mark is Microsoft, suggesting a type of software company.[71] An arbitrary mark is a mark that is the name of one product being used to sell another unrelated product, like Apple for computers.[72] And a fanciful mark is a mark that is a made-up name for a product, like Xerox for

[66] *Strong Trademarks*, U.S. PAT. AND TRADEMARK OFF., https://www.uspto.gov/trademarks/basics/strong-trademarks#:~:text=Descriptive%20trademarks%20merely%20describe%20some,in%20commerce%20over%20many%20years (last visited Mar. 25, 2023).

[67] *See* Sorensen v. WD-40 Co., 792 F.3d 712, 723 (7th Cir. 2015) ("Descriptive terms, after all, are protectable as a trademark if they have developed secondary meaning.").

[68] *See* Lanham Act § 2(f), 15 U.S.C. § 1052(f) ("Except as expressly excluded in subsections (a), (b), (c), (d), (e)(3), and (e)(5) of this section, nothing in this chapter shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods in commerce."); *see id.* ("The Director may accept as prima facie evidence that the mark has become distinctive, as used on or in connection with the applicant's goods in commerce, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date on which the claim of distinctiveness is made.").

[69] *See Descriptive Trademark: Everything You Need to Know*, UPCOUNSEL TECH., https://www.upcounsel.com/lanham-act (last visited Mar. 25, 2023) ("A descriptive trademark identifies one or more characteristics of a product or service covered by the mark and only serves to describe the product.").

[70] *Suggestive Trademark: Everything You Need to Know*, UPCOUNSEL TECH., https://www.upcounsel.com/lanham-act (last visited Mar. 25, 2023).

[71] *Id.*

[72] *See Arbitrary Trademark: Everything You Need to Know*, UPCOUNSEL TECH., https://www.upcounsel.com/lanham-act (last visited Mar. 25, 2023) ("An arbitrary trademark is a word or image that already exists, but it has nothing to do with the business that uses it. Apple Computers is one of the classic examples, since iPhones and laptops have nothing to do with fruit or cider. Shell gas stations and Camel cigarettes are other good examples.").

printers.[73] The suggestive, arbitrary, and fanciful marks are all entitled to trademark protection without having to prove they have acquired distinctiveness.[74]

The Lanham Act allows for numerous causes of action in the case of a violation,[75] but the two claims that will be addressed here are trademark infringement and dilution.

The trademark infringement claim includes using a mark that is either the same or similar to another individual's mark.[76] The standard for infringement is called the "confusingly similar" standard, which relies on the mark causing confusion, mistake, or deception in the eyes of the consumer.[77] Seven factors are called upon to determine if a mark is confusingly similar to another, which are enumerated in the *Polaroid v. Polarad* case.[78] These factors include (1) the strength of the plaintiff's trademark, (2) the degree of similarity between the two marks at issue, (3) the similarity of the goods and services at issue, (4) evidence of actual confusion, (5) purchaser sophistication, (6) the quality of the defendant's goods or services, and (7) the defendant's intent in adopting the mark.[79] Different circuits consider different factors, but there is much overlap between the circuits, and numerous *Polaroid* factors remain a popular choice among many circuit tests.[80]

In addition to the trademark infringement claim, the trademark dilution claim is a cause of action based on an "association arising from the similarity between a mark or trade name and a famous mark"

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[73] *See Fanciful Trademark: Everything You Need to Know*, UPCOUNSEL TECH., https://www.upcounsel.com/lanham-act (last visited Mar. 25, 2023) ("Fanciful trademarks are made-up terms invented for the single purpose of functioning as a trademark.").

[74] Abercrombie & Fitch Co. v. Hunting World, 537 F.2d 4, 17 (2d Cir. 1976) ("If a term is suggestive, it is entitled to registration without proof of secondary meaning. . . . It need hardly be added that fanciful or arbitrary terms enjoy all the rights accorded to suggestive terms as marks - without the need of debating whether the term is "merely descriptive" and with ease of establishing infringement.").

[75] *See* Lanham Act § 32(1)(a), 15 U.S.C. § 1114(1)(a) (listing the basis for the trademark infringement claim); *id.* § 1125(c) (listing the basis for the trademark dilution claim).

[76] 15 U.S.C. § 1114(1)(a), (b).

[77] *Id.*

[78] Polaroid Corp. v. Polarad Elects., 287 F.2d 492, 495 (2d Cir. 1961).

[79] *See id.* ("Where the products are different, a prior owner's chance of success in a trademark infringement action is a function of many variables: the strength of his mark, the degree of similarity between the two marks, the proximity of the products, the likelihood that the prior owner will bridge the gap, actual confusion, and the reciprocal of defendant's good faith in adopting its own mark, the quality of defendant's product, and the sophistication of the buyers.").

[80] Although the FDIC could bring an action in different jurisdictions with different tests, each jurisdiction recognizes numerous factors that are either similar or identical to the *Polaroid* facto.rs. Because of this, *Polaroid* has been a key case involving the standard for trademark infringement, and for purposes of this article, we will therefore rely on the polaroid factors for the confusingly similar analysis. Trademark Litigation: Likelihood of Confusion Tests by Circuit Chart, Practical Law Checklist 2-519-7062.

that impairs the distinctiveness or harms the reputation of a mark.[81] There are two species of trademark dilution.[82] "Dilution by blurring" prevents another mark from impairing the distinctiveness of a famous mark.[83] And "dilution by tarnishment" prevents another mark from harming the reputation of a famous mark.[84] Several factors are listed for consideration of a dilution by blurring claim, including (1) "[t]he degree of similarity between the mark or trade name and the famous mark," (2) "[t]he degree of inherent or acquired distinctiveness of the famous mark," (3) "[t]he extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark." (4) "[t]he degree of recognition of the famous mark," (5) "[w]hether the user of the mark or trade name intended to create an association with the famous mark," and (6) "any actual association between the mark or trade name and the famous mark."[85] For dilution by tarnishment, what constitutes harm to a mark varies between jurisdictions, but generally includes an association that imposes different values onto a mark that the original trademark holder did not intend.[86]

Overall, trademark dilution protects famous marks from losing the value they hold in consumers' minds by preventing other marks from impairing their distinctiveness and harming their reputation.[87]

B. Comparison of the FDIC False Advertising and Misrepresentation Statute to the Lanham Act

Several significant differences exist between the FDIC False Advertising and Misrepresentation statute and the Lanham Act. Many of these differences suggest that if the FDIC could enforce its name and logo as trademarks, it would expand the scope of enforcement against those making misrepresentations regarding its FDIC-insured status.

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[81] In order to qualify for a trademark dilution claim, the mark must be "famous." 15 U.S.C. § 1125(b)(2). This is evaluated using the fame factors, including, (i) the duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties, (ii) the amount, volume, and geographic extent of sales of goods or services offered under the mark, (iii) the extent of actual recognition of the mark, and (iv) whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register. *Id.*

[82] 15 U.S.C. § 1125(c)(2)(B), (C)

[83] *Id.* § 1125(c)(2)(B),

[84] *Id.* § 1125(c)(2)(C).

[85] *Id.* § 1125(c)(2)(B).

[86] For example, there are several jurisdictions that say that the reputation of a mark may be harmed by the association created by a similar mark that is used to sell sex related products. V Secret Catalogue, Inc. v. Moseley, 605 F.3d 382, 388 (6th Cir. 2010).

[87] 15 U.S.C. § 1125(c)(2)(B), (C).

1. Broader Standard for Bringing a Claim

Under the current FDIC statute, several requirements must be proved to bring a successful claim against a possible infringer.[88] For Section 328.102(a) of the regulation, this requirement is the "explicit or implied" representation of coverage when that coverage does not exist, specifically regarding the use of the FDIC logo and name.[89] For example, this would mean that to bring a successful claim, the FDIC would have to prove that using its name or logo would mislead the consumer to believe that its deposit was covered when it was not.[90]

In comparison, a trademark infringement claim would require that the FDIC name or logo was used and that the mark is "confusingly similar."[91] The confusingly similar standard would result in a much broader ability to control the use of the name or logo of the FDIC. When applying the *Polaroid* factors to the confusion analysis, the first two factors, (1) the strength of the plaintiff's trademark and (2) the degree of similarity between the two marks at issue, weigh overwhelmingly in favor of trademark infringement.[92] The FDIC has been a prominent participant in the US banking system for 90 years, indicating immense amounts of secondary meaning and thus a stronger mark.[93] Further, since the FDIC has been an exclusive user of its mark for more than five years, the statutory presumption for acquired distinctiveness would also be satisfied.[94] Additionally, the mark is entirely identical, showing the highest degree of similarity possible.[95] This is commonly referred to as "direct infringement," where the use of

[88] Advertisement of Membership, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo, 12 C.F.R. § 328.100 (2022).
[89] *Id.* § 328.102(a).
[90] *See id.*
[91] 15 U.S.C. § 1114(1)(a).
[92] *See* Polaroid Corp. v. Polarad Elects., 287 F.2d 492, 495 (2nd Cir. 1961) (explaining how a similarity between the marks lends towards a finding of trademark infringement based on the confusingly similar standard).
[93] *See* FED. DEPOSIT INS. CORP., THE FIRST FIFTY YEARS: A HISTORY OF THE FDIC 1933–1983, at 3 (1984) ("Established by the Banking Act of 1933 at the depth of the most severe banking crisis in the nation's history, its immediate contribution was the restoration of public confidence in banks.").
[94] *See* 15 U.S.C. § 1052(f) ("The Director may accept as prima facie evidence that the mark has become distinctive, as used on or in connection with the applicant's goods in commerce, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date on which the claim of distinctiveness is made.").
[95] *See Polaroid*, 287 F.2d 492, 495 (2nd Cir. 1961) (explaining how a similarity between the marks lends towards a finding of trademark infringement based on the confusingly similar standard).

identical marks causes the confusion.[96] Therefore, finding infringement of the FDIC marks would be much easier to prove than a claim under the FDIC statute.[97] In addition, factor four of the *Polaroid* test is very similar to the requirement under the current FDIC statute, that being evidence of actual confusion.[98] This means that even without evidence of actual confusion, a trademark infringement claim could still succeed, but the current FDIC statute would be entirely stifled.[99]

For Section 328.102(b) of the regulation, the requirement for a successful claim is that there is a "false or misleading" representation regarding the deposit insurance.[100] This would result in the same argument as above, where confusion would be a much easier standard to apply because of *Polaroid* factors one and two.[101] Further, the lack of any misrepresentation would stifle a claim under the FDIC statute where a trademark infringement claim could still succeed.[102]

In addition to trademark infringement, the trademark dilution claim would also be a broader claim than the current FDIC statute. The first four factors for considering a dilution by blurring claim would all weigh heavily in favor of the FDIC.[103] The use of the marks would be identical, and the secondary meaning of the FDIC name would be prominent.[104] Further, the FDIC has been the only entity to use the marks for 90 years, and the mark is a staple within commercial banks today.[105] This would give a dilution by blurring claim a high likelihood for success.[106]

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[96] *Direct Infringement*, CORNELL LAW SCHOOL: LEGAL INFO. INST., https://www.law.cornell.edu/wex/direct_infringement#:~:text=In%20trademark%20law%2C%20direct%20infringement,cause%20mistake%2C%20or%20to%20deceive (last visited Mar. 25, 2023).

[97] *Id.*

[98] *Compare Polaroid*, 287 F.2d 492, 495 (2d Cir. 1961), *with* Advertisement of Membership, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo, 12 C.F.R. § 328.100 (2022).

[99] *See Polaroid*, 287 F.2d 492, 495 (2d Cir. 1961) (explaining that not all factors for confusion are required to succeed on a trademark infringement claim).

[100] 12 C.F.R. § 328.102(b).

[101] *Compare Polaroid*, 287 F.2d 492, 495 (2nd Cir. 1961), *with* 12 C.F.R. § 328.102(a).

[102] *Compare Polaroid*, 287 F.2d 492, 495 (2nd Cir. 1961), *with* 12 C.F.R. § 328.102(a).

[103] *See* Lanham Act § 43(c)(2)(B), 15 U.S.C. § 1125(c)(2)(B) (listing the factors for considering a trademark dilution claim).

[104] *Id.*

[105] *See id.* (reasoning that because the marks are identical and the FDIC brand is strong, that the factors listed in the statute would weigh heavily in favor of finding a claim for trademark dilution).

[106] *Id.*

Overall, trademark law would make these claims much more likely to succeed, and the FDIC would also have more discretion over the moderation of the use of its trademarks.[107] This would also mean the FDIC could sooner stop the harm caused by consumer confusion.[108]

2. Scienter Requirement

A notable feature of Section 328.102(b) of the FDIC regulation is the scienter requirement for bringing a claim against an infringer.[109] To "knowingly" make false or misleading representations about deposit insurance substantially raises the bar for proving this claim because the FDIC would be required to argue that, in the infringer's mind, they knew they were misleading consumers with its representations.[110]

Under the Lanham Act and the *Polaroid* factors, however, there is no requirement of knowledge or any other scienter of the infringer.[111] This would make a claim much easier to prove because there is no guesswork regarding what the infringer really meant when making representations.[112] However, a factor of the *Polaroid* test does include "the defendant's intent in adopting the mark,"[113] and a factor for dilution by blurring is "whether the user of the mark or trade name intended to create an association with the famous mark."[114] This means that being able to prove bad intent on the part of the infringer would

[107] *See Polaroid*, 287 F.2d 492, 495 (2nd Cir. 1961) (reasoning that the wide variety of factors provide a wide array of arguments that can be made against possible infringers and that more than just these factors may be considered in the analysis).

[108] *Id.*

[109] Advertisement of Membership, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo, 12 C.F.R. § 328.102(b) (2022).

[110] *Id.*; *see also* Toby Gilbert, *Regulators Have a Weak Case Against FTX on Deposit Insurance*, COINTELEGRAPH (Aug. 26, 2022), https://cointelegraph.com/news/regulators-have-a-weak-case-against-ftx (explaining how the "knowing" requirement would be difficult to establish given the specific facts of FTX's representation about FDIC insurance).

[111] *Compare* Lanham Act § 43(c)(2), 15 U.S.C. § 1125(c)(2), *and id.* § 1114, *with Polaroid*, 287 F.2d 492 (2nd Cir. 1961) (demonstrating the absence of any scienter requirement that is necessary to bring a trademark claim).

[112] *See Mens Rea*, CORNELL LAW SCHOOL: LEGAL INFO. INST, https://www.law.cornell.edu/wex/mens_rea (last visited Apr. 21, 2023) (explaining the different mental states required to prove different types of claims and how they get progressively harder to prove the closer you get to intent).

[113] Polaroid Corp. v. Polarad Elects., 287 F.2d 492 (2d Cir. 1961).

[114] 15 U.S.C. § 1125(c)(2).

increase the likelihood of success on a trademark claim.[115] But it would by no means prohibit the success of these claims as it would under the FDIC statute.[116]

3. Expansive Case Law

Another important distinction between the FDIC statute and the Lanham Act is that the case law surrounding the Lanham Act dwarfs that surrounding the FDIC statute.[117] Because trademark laws have taken many shapes and forms until its culmination in the Lanham Act, trademark disputes have been at issue for a significant period of time.[118] This means that if the FDIC wanted to bring a claim against a possible infringer, they could rely on a significantly larger amount of cases than if they were litigating solely with the FDIC statute and regulations.[119]

This also means that if infringers were to get creative with how they may use the FDIC name and logo, the vast amount of trademark case law would help the FDIC craft an innovative solution to the infringement.[120] For example, if an infringer were to carefully suggest that it was an FDIC-insured institution without using the exact FDIC name and logo, the confusingly similar standard may still be used to file a claim against them by speaking specifically to the caselaw of the jurisdiction.[121]

[115] *Compare Polaroid*, 287 F.2d 492, 495 (2d Cir. 1961), *and* 15 U.S.C. § 1125(c)(2), *with* Advertisement of Membership, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo, 12 C.F.R. § 328.102(b) (2022) (demonstrating how the lack of a knowledge requirement could completely defeat a claim under he FDIC statute, but would not defeat a trademark claim).

[116] *Compare Polaroid*, 287 F.2d 492, 495 (2d Cir. 1961), *and* 15 U.S.C. § 1125(c)(2), *with* 12 C.F.R. § 328.102(b) (2022) (demonstrating how the lack of a knowledge requirement could completely defeat a claim under he FDIC statute, but would not defeat a trademark claim).

[117] *See Key Cases and Definitions in Intellectual Property Law*, WASH. UNIV. SCH. OF L. (Jun. 10, 2021), https://onlinelaw.wustl.edu/blog/key-cases-definitions-in-intellectual-property-law/ (explaining the vast history of trademark law in the United States and the large amount of significant caselaw surrounding trademark law).

[118] *Id.*

[119] *See id.* (reasoning that the large amount of caselaw surrounding the Lanham Act would provide the FDIC with the tools necessary to stop infringers from confusing consumers).

[120] It is very common in trademark law for someone to attempt to evoke another brand by trying to emulate their trademarks without copying them identically. In particular, parody in trademark law has been a hot topic as of recent, and presents much case law that could be relevant if a FinTech were to evoke the idea that they may be FDIC insured without directly copying their name or logo. *See generally* Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC., 507 F.3d 252 (4th Cir. 2007) (explaining how one company may have a valid claim against another for creating a dog toy that replicates another's product without using the exact words and colors, but rather brings the ideas of the other product to mind through the dog toy).

[121] *Compare* Polaroid Corp. v. Polarad Elects., 287 F.2d 492, 495 (2d Cir. 1961), *with* 12 C.F.R. § 328.102(a).

Applicant Details

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Applicant Education

BA/BS From	**University of Massachusetts-Dartmouth**
Date of BA/BS	**May 2013**
JD/LLB From	**University of Massachusetts School of Law-Dartmouth**
Date of JD/LLB	**May 15, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**University of Massachusetts Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Appellate, Immigration**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 25, 2023

The Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a third-year law student at the University of Massachusetts School of Law, graduating in May of 2024, where I am a Staff Editor of the University of Massachusetts Law Review. I am writing to apply for a clerkship position in your chambers at the U.S. District Court for the Eastern District of Virginia for the 2024-2025 term or thereafter. I aspire to pursue a career as an attorney in the areas of Constitutional and human rights law and believe that my extensive academic, professional, writing, and research experience would make me an ideal candidate for this position.

My time as a law student has been dominated by legal research and writing. While working in two immigration law firms and at the Bristol County District Attorney's Office, I was constantly researching relevant federal and state case law and administrative law decisions. Drafting legislation in Senator Mark Montigny's office required significant attention to detail to language and thoroughly trained me in statutory analysis and construction.

Each of my legal internship experiences have had substantial legal research and writing components and visible real-world impacts. I strongly believe in the idea that working in the legal profession carries with it the opportunity and privilege to bring about material and positive change in other people's lives. I have intentionally sought out legal work experiences with a strong public service component, whether in a governmental role or aiding disadvantaged groups while working in the private sector.

This Fall I will further polish my skills working as a research assistant to Professor Faisal Chaudhry on a law review article and interning in the chambers of Justice Frank M. Gaziano of the Massachusetts Supreme Judicial Court. My past professional and life experiences have prepared me to contribute meaningfully to your chambers on day one should I get the opportunity.

Enclosed are my resume, law school transcript, and writing sample. My recommendations from Professor Geoffrey McDonald, Associate Dean Spencer Clough, and Senator Mark Montigny will be submitted under separate cover. I would relish the opportunity to work for you at the U.S. District Court for the Eastern District of Virginia and I thank you for your consideration.

Respectfully,

Christopher A. Amaral

Christopher A. Amaral

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Education

University of Massachusetts School of Law, Dartmouth, MA
Juris Doctor Candidate (May 2024, anticipated)
- GPA: 3.45 (top 20%)
- Staff Editor, University of Massachusetts Law Review
- Vice President, International Law Student Association
- Member, Mock Trial Team
- Massachusetts Supreme Judicial Court Pro-Bono Honor Roll Award Recipient
- European Legal Practice Integrated Studies "Global Classroom Initiative"
- Member, Delta Theta Phi, Judge Francis J. Larkin Senate
- Member, National Lawyers Guild

University of Glasgow, Glasgow, Scotland, United Kingdom
Master of Letters in History, Graduated with Merit (December 2014)
- Dissertation: "The Liberal Nobility & Old Regime Constitutionalism in Revolutionary France"
- Member, Glasgow University Union
- Member, Glasgow University Philosophy Society

University of Massachusetts Dartmouth, Dartmouth, MA
Bachelor of Arts in History and French with a Minor in Philosophy, Magna Cum Laude (May 2013)
- Honors Program Commonwealth Scholar
- Dean's List Recipient for 8 consecutive semesters
- Pi Delta Phi Honor Society [French Studies]
- Phi Alpha Theta Honor Society [History Studies]
- Studied abroad as a Commonwealth Honors Program Summer Grant recipient in Paris, France (July 2012)

Legal Experience

Massachusetts Supreme Judicial Court, Justice Frank M. Gaziano, Boston, MA
Judicial Intern (Anticipated September 2023)
- Anticipated duties include writing bench memoranda, evaluating "further appellate review" requests, legal research, observing oral arguments, and assisting Justice Gaziano in chambers

Law Offices of Lider, Fogarty, and Ribeiro, P.C., Fall River, MA
Summer Associate (May 2023-Present)
- Draft Immigration Court and Board of Immigration Appeals briefs and motions at multinational immigration firm
- Conduct extensive legal research to prepare asylum, permanent residency, and naturalization applications
- Observe client meetings and conduct interviews for client declarations
- Participate in hearings before the Immigration Court and Board of Immigration Appeals

Bristol County District Attorney's Office, Appeals Unit, Fall River, MA
Legal Intern (February 2023-June 2023)
- Conducted extensive legal research supporting the Commonwealth's criminal appellate cases
- Drafted the Commonwealth's appellate brief in a case pending before the Massachusetts Appeals Court

Massachusetts State Senate, Senator Mark C. Montigny, Boston, MA
Legal Intern (June 2022-August 2022)
- Conducted extensive legal research on Federal and Massachusetts state statutes
- Engaged in various legal writing tasks including the drafting of a bill combatting human trafficking (S.1063)
- Met one-on-one with local community leaders in the district to research and support proposed legislation

Law Office of Jennifer Velarde, New Bedford, MA
Legal Intern **(**February 2022-May 2022)
- Conducted research on human rights abuses and country conditions to support asylum cases
- Drafted legal memoranda, country condition reports, and other documents to support clients' cases

Publications and Works in Progress

- *Moharebeh and the State: The Shari'a, Sovereignty, and the Islamic Law of Revolution* (in progress)
- *A Matter of (Historical) Interpretation: Originalism and the Use and Interpretation of Historical Evidence by the Supreme Court*, Dartmouth Law Journal (Publication Forthcoming in September 2023)

Other Professional Experience

University of Massachusetts School of Law, Dr. Faisal Chaudhry, Dartmouth, MA
Research Assistant (May 2023-Present)
- Conduct research for Professor Chaudhry's upcoming law review article juxtaposing the work of Ronald Coase and K. William Kapp

Northeast Maritime Institute, College of Maritime Science, Fairhaven, MA
Adjunct Professor **(**December 2022-Present)
- Teach courses in American Government and Politics to undergraduate students at private maritime college

University of Massachusetts School of Law, Dartmouth, MA
Academic Fellow (June 2022-Present)
- Serve as Teaching Assistant to students in core 1L courses, legal writing skills, and legal research

Bristol Community College, History Department, Fall River, MA
Adjunct Professor (July 2016-Present)
- Teach courses in American History, American Government, and World History to undergraduate students

University of Massachusetts Dartmouth, Writing and Reading Center, Dartmouth, MA
Tutor (September 2010-May 2013)
- Helped struggling students with research papers, essay outlines, grammar, syntax, and study skills

University of Massachusetts Dartmouth, History Department, Dr. Paula Noversa, Dartmouth, MA
Research Assistant (September 2012- December 2012)
- Assisted Professor Noversa's students in the use of primary sources, citation style, and general research

Campaign for City Councilor, New Bedford City Council, New Bedford, MA
Candidate for Elected Office (March 2017-October 2017)
- Ran a political campaign as a candidate for New Bedford City Council Ward-1 seat

Volunteer Work and Community Service

Community Preservation Act Committee, New Bedford, MA
Committee Member (April 2018-Present)
- Meet regularly with Committee members, preside over hearings to choose projects for funding, and vote to allocate CPA monies to community projects
- Nominated by the Mayor of New Bedford and confirmed by the New Bedford City Council

Centro Comunitario de Trabajadores, New Bedford, MA
Law Student Volunteer for Justice at Work Collaborative (December 2022-May 2023)
- Prepared Freedom of Information Act requests, FBI background checks, and other legal work in support of undocumented workers' U-Visa applications

Massachusetts Governor Campaign, New Bedford, MA
Senate District Coordinator-Bristol County (January 2018-April 2018)
- Coordinated campaign efforts with local campaign offices, activists, and voters throughout Bristol County

Languages

French (Fluent)
Portuguese [European] (Professional working proficiency)
Spanish (Limited working proficiency)

Unofficial

Name: Christopher Amaral

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285 Old Westport Road
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Print Date: 06/03/2023

Degrees Awarded

Degree: Bachelor of Arts
Confer Date: 05/12/2013
Degree GPA: 3.552
Degree Honors: Magna Cum Laude
Plan: History Major
Plan: French Major
Plan: Philosophy Minor
Plan: Commonwealth Honors Program of Study

---------- Beginning of Law Record ----------

2021 Fall

Program: Law
Plan: Law Program of Study

Course		Description	Attempted	Earned	Grade	Points
LAW	500	Academic Skills Lab	0.00	0.00	P	0.000
LAW	510	Legal Skills I	3.00	3.00	B-	8.100
LAW	515	Torts I	3.00	3.00	B-	8.100
LAW	530	Property I	3.00	3.00	A	12.000
LAW	540	Contracts I	3.00	3.00	B+	9.900
LAW	545	Civil Procedure I	3.00	3.00	B+	9.900

		Attempted	Earned	GPA Units	Points
Term GPA:	3.200 Term Totals:	15.00	15.00	15.00	48.000
Cum GPA:	3.200 Cum Totals:	15.00	15.00	15.00	48.000

2022 Sprng

Program: Law
Plan: Law Program of Study

Course		Description	Attempted	Earned	Grade	Points
LAW	511	Legal Skills II	3.00	3.00	B	9.000
LAW	516	Torts II	3.00	3.00	A+	12.000
LAW	531	Property II	3.00	3.00	B+	9.900
LAW	541	Contracts II	3.00	3.00	B	9.000
LAW	546	Civil Procedure II	3.00	3.00	A-	11.100

		Attempted	Earned	GPA Units	Points
Term GPA:	3.400 Term Totals:	15.00	15.00	15.00	51.000
Cum GPA:	3.300 Cum Totals:	30.00	30.00	30.00	99.000

2022 Summr

Program: Law
Plan: Law Program of Study

Course		Description	Attempted	Earned	Grade	Points
LAW	525	Professional Responsibility	3.00	3.00	B+	9.900
LAW	699	Topic	3.00	3.00	A+	12.000
Course Topic:		Participatory Democracy				

		Attempted	Earned	GPA Units	Points
Term GPA:	3.650 Term Totals:	6.00	6.00	6.00	21.900
Cum GPA:	3.358 Cum Totals:	36.00	36.00	36.00	120.900

2022 Fall

Program: Law
Plan: Law Program of Study

Course		Description	Attempted	Earned	Grade	Points
LAW	512	Legal Skills III	3.00	3.00	A-	11.100
LAW	520	Criminal Law	3.00	3.00	B	9.000
LAW	555	Constitutional Law I	3.00	3.00	A	12.000
LAW	576	Evidence	3.00	3.00	B-	8.100
LAW	696	Law Review Note Writing	2.00	2.00	P	0.000

		Attempted	Earned	GPA Units	Points
Term GPA:	3.350 Term Totals:	14.00	14.00	12.00	40.200
Cum GPA:	3.356 Cum Totals:	50.00	50.00	48.00	161.100

Unofficial

Name: Christopher Amaral

Student ID: 00824259

University of Massachusetts Dartmouth
285 Old Westport Road
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2023 Sprng

Program: Law
Plan: Law Program of Study

Course		Description	Attempted	Earned	Grade	Points
LAW	521	Criminal Procedure	3.00	3.00	B+	9.900
LAW	556	Constitutional Law II	3.00	3.00	B+	9.900
LAW	580	Trusts & Estates	4.00	4.00	A+	16.000
LAW	607	Statutory Interpretation	3.00	3.00	A+	12.000
LAW	716	Introduction to Islamic Law	3.00	3.00	A	12.000

			Attempted	Earned	GPA Units	Points
Term GPA:	3.738	Term Totals:	16.00	16.00	16.00	59.800
Cum GPA:	3.452	Cum Totals:	66.00	66.00	64.00	220.900

2023 Summr

Program: Law
Plan: Law Program of Study

Course		Description	Attempted	Earned	Grade	Points
LAW	585	Business Organizations	3.00	0.00		0.000
LAW	620	Trial Practice	3.00	0.00		0.000

			Attempted	Earned	GPA Units	Points
Term GPA:	0.000	Term Totals:	6.00	0.00	0.00	0.000
Cum GPA:	3.452	Cum Totals:	72.00	66.00	64.00	220.900

2023 Fall

Program: Law
Plan: Law Program of Study

Course		Description	Attempted	Earned	Grade	Points
LAW	560	Administrative Law	3.00	0.00		0.000
LAW	613	Federal Income Tax	4.00	0.00		0.000
LAW	639	Field Placement	4.00	0.00		0.000
LAW	697	Law Review I	2.00	0.00		0.000
LAW	721	International Contract Law	1.00	0.00		0.000

			Attempted	Earned	GPA Units	Points
Term GPA:	0.000	Term Totals:	14.00	0.00	0.00	0.000
Cum GPA:	3.452	Cum Totals:	86.00	66.00	64.00	220.900

Law Career Totals

			Attempted	Earned	GPA Units	Points
Cum GPA:	3.452	Cum Totals:	86.00	66.00	64.00	220.900

End of Unofficial

TO: Members of the Federal Bench

FROM: Spencer E. Clough, Associate Dean/Director of the Law Library/Assoc. Professor

DATE: June 16, 2023

RE: Christopher A. Amaral

Mr. Amaral has informed me that he is making an application for a Federal Judicial clerkship with your court. He requested that I provide you with a recommendation of his abilities and suitability for this endeavor. It is with great pleasure and enthusiasm that I provide this letter to you.

During the Spring semester of 2023, Mr. Amaral was enrolled in my class Statutory Interpretation, for which he earned an A+. Mr. Amaral was fully engaged in class discussions of the principles and cases we studied. His contributions to those discussions were thoughtful, articulate, and nuanced. As a mature student, he had the quiet confidence to bring new information to the class, or to be able to challenge the instructor, in a manner that supported the class experience without disrupting the continuity of the presentation.

His success in Statutory Interpretation demonstrates that he is knowledgeable, articulate, analytical, and capable. The application of his knowledge and skills in a Federal Court is very appropriate for a law student with his skills and abilities. I believe that he will accomplish any task or challenge that is set before him in your program.

I urge you to give full attention to his application. Mr. Amaral has my complete confidence that he will prove to be a highly accomplished graduate of the University of Massachusetts Dartmouth in the near future.

If I can be of any further assistance in reaching a decision on his application, please do not hesitate to contact me at: sclough@umassd.edu, or 508-985-1161.

Spencer E. Clough

/s/ Spencer E. Clough

Associate Dean/Director of the Law Library/Associate Professor

23 June 2023

Re: **Christopher A. Amaral**

Dear Judge:

I am writing in support of Christopher A. Amaral, who has applied for a clerkship.

Christopher took my Contracts I and Contracts II courses in the 2021-2022 academic year at UMass Law School. This year was very challenging for everyone as all of our meetings, outside of class, were remote. Nevertheless, Christopher stood out among his peers in terms of his rigorous preparation and his enthusiasm for the study of law. Christopher brings a certain maturity and wisdom to the table, well beyond his years, due to his prior graduate studies and work experience.

Christopher is very bright and has demonstrated an eagerness to learn. He is incredibly diligent as well. Christopher is a natural leader and has earned the respect of his colleagues and professors through his intellectual curiosity, ambition, and kindness. I am also impressed with Christopher's research and writing skills. He is a Staff Editor of the University of Massachusetts Law Review and, with his experience as a Judicial Intern, I am sure he will be an excellent clerk.

Christopher is an outstanding young man who has a very strong interest in studying the law with the ability to grasp its intricacies. He has demonstrated the character and work ethic that I am confident will lead to continued success in his legal studies and subsequent legal career. I am happy to support his application for a clerkship. I strongly, warmly, and unreservedly recommend him to you.

Please feel free to contact me if you need further information.

Sincerely,

Geoffrey K. McDonald
Assistant Professor of Law
UMass Law School
Phone: 508-985-1142
Email: gmcdonald@umassd.edu

The Commonwealth of Massachusetts
MASSACHUSETTS SENATE

Senator Mark Montigny
Second Bristol and Plymouth District

State House, Room 312C
Boston, MA 02133-1053
Tel: (617) 722-1440
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Mark.Montigny@MAsenate.gov
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Chair
Senate Committee on
Steering and Policy
Chair
Senate Committee on
Intergovernmental Affairs

June 16, 2023

RE: Letter of Recommendation for Christopher Amaral

It is with great pleasure that I recommend to you Christopher Amaral for a judicial clerkship. Mr. Amaral served as a legal intern in my legislative office during the summer of 2022. During that time, I came to know Mr. Amaral's exceptional legal skills as well as his steadfast demeanor in dealing with complicated issues requiring great attention and care. Mr. Amaral is an outstanding young advocate who will undoubtably make a positive impact upon the legal profession.

Mr. Amaral's efforts in my Senate office resulted in new legislation to combat human trafficking. For much of my legislative career, I have focused on intense policy work surrounding issues pertaining to this egregious exploitation of human lives. Several pieces of legislation I filed over the years have been signed into law, but much work remains to be done. Upon entering my office, Mr. Amaral exhibited a keen interest in this policy work and immediately began researching ways to further improve state policy in Massachusetts. Working in partnership with my legislative director, Mr. Amaral then drafted legislation to create a comprehensive framework to greatly enhance public awareness of this issue across our transportation system and within our emergency medical facilities.

Mr. Amaral also met with my constituents and local officials to discuss important issues, including access to affordable housing and benefits for veterans. His care and attention to detail was a great service to my legislative district.

In closing, I give Mr. Amaral my unqualified and most enthusiastic recommendation. Please do not hesitate to contact my office if we can provide any additional information. Thank you for your time and consideration.

Sincerely,

Mark C. Montigny
Senator

Christopher A. Amaral
New Bedford, MA|(508) 264-7478|camaral@umassd.edu|linkedin.com/in/christopher-amaral-8959a095/

WRITING SAMPLE

The following writing sample is entirely my own work and has not been written or edited by anyone else. This writing sample is an excerpt of a brief written as a Summer Associate in support of a client's asylum hearing before the Executive Office for Immigration Review. I was given the client's case file and personal declaration and tasked with drafting the brief and researching the relevant case law from the Federal Circuit Courts (particularly that of the First Circuit) and the Board of Immigration Appeals. The excerpt includes an Introduction, Statement of Facts, an abridged Argument section, and Conclusion. All names, places, alien numbers, and facts that would identify the client or any other person involved in this case have been altered or redacted and its use as a writing sample has been approved by my supervising attorney.

Christopher Amaral- Writing Sample

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
BOSTON, MASSACHUSETTS

IN THE MATTER OF:	)	
	)	
[name redacted]	)	File No. [redacted]
	)	
	)	
	)	
	)	
Respondent,	)	
in Removal Proceedings	)	
	)	

Individual Hearing: [redacted] IJ: Hon. [redacted]

RESPONDENT'S BRIEF IN SUPPORT OF HIS APPLICATION FOR ASYLUM, WITHHOLDING OF REMOVAL, AND PROTECTION UNDER ARTICLE III OF THE CONVENTION AGAINST TORTURE

1

Christopher Amaral- Writing Sample

I. INTRODUCTION

Respondent [name redacted], submits through undersigned counsel, his supplemental brief in support of his application for asylum, withholding of removal, and relief under the Convention Against Torture (CAT). Respondent has a well-founded fear of persecution by police officials and individuals in criminal gangs who the government of Ecuador is unwilling or unable to control.

II. STATEMENT OF FACTS

A. Factual bases for Respondent's claim[1]

Respondent was born in the town of [redacted] in Guayas Province, Ecuador. As he was walking home from work as a security guard at a local bank, a black car driven by several members of the notorious Los Choneros gang stopped the Respondent and beckoned him inside the car with a gun. He complied with their armed threat and entered the car where they offered him a proposal to join their gang and demanded that he help them to rob the bank where the Respondent worked. When the Respondent refused to accept, they released him saying that they would "get back" to him about their offer. Less than a week later, members of the same gang, now with a uniformed police sergeant, again brought the Respondent into their car at gunpoint. This time when the Respondent refused to join, the gang members and police sergeant reacted by violently attacking him inside the car. During this incident, he was savagely beaten, had his tooth broken, and suffered painful electrocution. However, despite this treatment the Respondent, clinging to his religious faith, steadfastly refused to join. He was released and went to the hospital to treat his injuries.

Days later, the same police sergeant who had assisted with the brutal treatment of the Respondent again stopped him and seized his I.D. The officer detained him in his police car while he made a cellphone call to the gang. The officer kept him waiting inside the car for a quarter of

[1] The facts in this section are taken from the testimony of Respondent in his declaration and I-589 and amendments, except where otherwise noted.

an hour before taking the Respondent to a trailer where gang members were waiting. Once inside the trailer, the gang members, along with the police sergeant, again began to beat the Respondent when he refused to join them. While inside the trailer the police sergeant took up a baseball bat and swung it down on the Respondent, breaking the bones in his right hand. A gang member present cut him with a knife while his assailants poured gasoline over him and threatened to kill him. Only at this point did the Respondent break and tell them that he would join their gang. Despite all this, and after a phone call to his mother, he decided to flee the area.

Just four days later, the gang members stopped him again in their black car to tell him the date when they planned to rob the bank. They beat him again, striking him repeatedly in his stomach and groin before departing. He was told that if he quit his job at the bank or attempted to flee to another area of the country, "they would always find [him] and kill [him]." He went to the hospital and had to be treated for blood clots in his chest from the previous assaults. Within ten days of his first encounter with the gang, he had been brutally attacked and tortured at least three times and threatened with death at least twice. Not wishing to succumb to the gang and join them, but not wishing to be executed by them either, he decided to flee to the United States.

III. Argument

A. Respondent qualifies for asylum because he has a well-founded fear of persecution if he is returned to Ecuador

1. Statutory Framework

Establishing eligibility for asylum requires that: 1) the applicant demonstrate statutory eligibility; and 2) his claim must warrant a favorable exercise of discretion. INA § 208(a). To be eligible for asylum, the applicant must show that he qualifies as a refugee as defined by the Immigration and Nationality Act (INA). *Villa-Londono v. Holder,* 600 F.3d 21, 24 (1st Cir. 2010).

An applicant may qualify for asylum either because he has suffered past persecution or because he has a well-founded fear of future persecution. 8 C.F.R. § 208.13(b); s*ee also Makhoul v. Ashcroft,* 387 F.3d 75, 79 (1st Cir. 2004).

2. Respondent suffered past persecution in Ecuador.

It has been recognized that past persecution, even absent some proof of a well-founded fear of future persecution, may be the basis for a grant of asylum. *Matter of S-A-*, 22 I&N Dec. 1328, 1334-35 (BIA 2000). The First Circuit has held that, "[i]f the applicant establishes past persecution, there is 'a rebuttable presumption of a well-founded fear of future persecution.'" *Martinez-Perez v. Sessions,* 897 F.3d 33, 39 (1st Cir. 2018) (*quoting De Carvalho-Frois v. Holder*, 667 F.3d 69, 72 (1st Cir. 2012)). If past persecution is established, the burden shifts to the government to rebut this presumption by a preponderance of the evidence to show that either: 1) the applicant's life or freedom would not be threatened due to a fundamental change in circumstances, or 2) the applicant could avoid the threat to their life by relocating in their home country if reasonable. 8 C.F.R. §1208.16(b).

Persecution, in the context of refugee asylum seekers, has been defined as "harm or suffering that is inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome." *Matter of Acosta,* 19 I&N Dec. 211 (BIA 1985); *Silva v. Gonzales,* 463 F.3d 68, 71 (1st Cir. 2006). The harm or suffering need not be perpetrated by a government but may be carried out by persons or entities that the government is "unwilling or unable to control." *Matter of Acosta,* 19 I&N Dec. at 222. The Board of Immigration Appeals ("BIA") further defined persecution as "a threat to the life or freedom of, or the infliction of suffering or harm upon those who differ in a way regarded as offensive." *Id.* An applicant for asylum establishes a well-founded fear of persecution if he shows that:

> (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien. *Matter of Mogharrabi*, 19 I&N Dec. 439, 446 (BIA 1987) (*citing Matter of Acosta*, 19 I&N Dec. at 212).

The aggregate of the applicant's experiences "must add up to more than ordinary harassment, mistreatment, or suffering." *Lopez de Hincapie v. Gonzales*, 494 F.3d 213, 217 (1st Cir. 2015); s*ee also Attia v. Gonzales*, 477 F.3d 21, 23 (1st Cir. 2007). The First Circuit has held that the question of what constitutes persecution is to be determined "case by case." *Raza v. Gonzales,* 484 F.3d 125, 129 (1st Cir. 2007).

In the present case, the Respondent was threatened with death and the possibility of torture in the future if he did not join the Los Choneros gang and aid them in robbing the bank where he worked as a security officer. Torture has been statutorily defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person." 8 C.F.R. § 1208.18(a)(1); *see also Rodriguez de Ayala v. Barr,* 819 Fed. Appx. 487, 490 (9th Cir. 2020). The threat of future torture is not illusory in this case as Respondent has already suffered actual torture and serious bodily injuries at the hands of gang members and a uniformed police sergeant. The psychological trauma of his torture also heavily contributed to the Respondent's aggregated suffering. Death threats have been held to constitute past persecution in some cases by the First Circuit. *Un v. Gonzales*, 415 F. 3d 205, 2010 (1st Cir. 2005) ("It seems to us that credible verbal death threats may fall within the meaning of 'persecution.' We have indicated that a threat to life could amount to persecution"); *see also Aguilar-Solis v. INS,* 168 F.3d 565, 570 (1st Cir. 1999) ("[P]ersecution encompasses more than threats to life or freedom...."). The participation of a police sergeant in the beatings, torture, and death threats carried out by the gang further buttresses

the Respondent's claim that he has suffered persecution from persons that the Ecuadorean government is "unwilling or unable to control." *Matter of Acosta,* 19 I&N Dec. at 222.

3. Respondent was persecuted as a member of a cognizable particular social group.

The Respondent is in the particular social group (PSG) of "Ecuadorean Men who have been tortured by criminal gangs for resisting gang recruitment."

a. Statutory Framework and Construction

The BIA, utilizing the canon of construction *ejusdem generis* ("of the same kind"),[2] interpreted the term "particular social group" in the context of the other asylum categories listed in the statute (race, religion, nationality, political opinion). *Matter of Acosta,* 19 I&N Dec. at 233; 8 U.S.C. § 1101(a)(27)(H)(42). It held that, like the other categories listed, a particular social group encompassed innate characteristics. *Matter of Acosta,* 19 I&N Dec. at 233. To be considered a member of a PSG, the Respondent must demonstrate that he 1) shares a common and immutable characteristic and 2) that the refugee cannot change or should not be forced to change this characteristic. *Id*. While the term "particular social group" is not defined in the INA, the Circuit Courts and BIA have considered certain categories like gender, sexual orientation, nuclear families, and common past experiences as bases for inclusion in a PSG for asylum purposes. *See generally Matter of Kasinga,* 21 I&N Dec. 357 (BIA 1996) (holding that gender may be basis of a PSG); *Matter of Toboso-Alfonso,* 20 I&N Dec. 819 (BIA 1990) (holding sexual orientation as possible basis of a PSG); *Gebremichael v. INS*, 10 F.3d 28 (1st Cir. 1993) (holding nuclear families as a possible basis of a PSG); *Tapiero de Orjuela v. Gonzales*, 423 F.3d 666 (7th Cir. 2005) (holding past experiences may be basis of a PSG).

[2] ANTONIN SCALIA & BRYAN A. GARDNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 199 (2012).

However, while the courts have carved out certain definitive categories of PSG membership, this does not preclude other social groups from inclusion as PSGs, and the caselaw encompasses groups not otherwise enumerated by precedent as protected categories. *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986). To avoid the PSG category from being a "catch-all" for all asylum cases, the PSG must satisfy a three-prong test requiring the PSG to be: "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014).

i. Ecuadorean Men who have been tortured by criminal gangs for resisting gang recruitment

The PSG of "Ecuadorean men who have been tortured by criminal gangs for resisting gang recruitment" is one that carries with it an immutable characteristic based on past experiences, may be defined with particularity, and is clearly defined within Ecuadorean society.

I. The Respondent shares the immutable characteristic of having experienced intimidation and torture at the hands of criminal gangs.

The BIA has described immutable characteristics as those "that the members cannot change, or should not be required to change because it is fundamental to their individual identities and consciences."[3] *Matter of Acosta*, 19 I&N Dec. at 232-33. The First Circuit held in *Vega-Ayala v. Lynch* that an El Salvadorean woman who suffered physical abuse at the hands of her boyfriend did not have an immutable characteristic because there were numerous occasions where she was able to safely leave him. 833 F.3d 34, 36 (1st Cir. 2016). In that case, the Petitioner's boyfriend was incarcerated for the last year of their relationship, but she still maintained frequent contact

[3] This standard has since been adopted as the dominant international standard, particularly among common law countries including Canada, New Zealand, and the United Kingdom. Talia Shiff, *Revisiting Immunity: Competing Frameworks for Adjudicating Asylum Based Membership in a Particular Social Group*, 53 MICH. J.L. REFORM 567, 570 (Spring, 2020).

with him despite the past abuse. *Id*. The fact that she failed to prove that she was unable to leave and escape her boyfriend's abuse, the purported immutable characteristic, was crucial in the Court's finding that the Petitioner in that case failed to prove an immutable characteristic. *Id*. Unlike in *Vega-Ayala*, the Respondent in the present case attempted on several occasions to avoid the criminal individuals that had abused him. There was also no real possibility of escape because the Los Choneros gang was present not only within the area where the Respondent lived but was, and remains, present throughout the entire country of Ecuador. The alliances formed between the Los Choneros gang, individuals in local law enforcement, and other larger regional gangs like the Sinaloa gang in Mexico make it impossible for the Respondent to seek refuge anywhere in Ecuador or nearby countries where this gang holds sway. Unlike the Petitioner's ability to leave her abusive boyfriend in *Vega-Ayala*, the threat in this case was not contained, but presented an ongoing and near omnipresent threat to Respondent's life, distinguishing it sharply from the precedent case.

It is true that mere resistance to gang recruitment has in some cases been rejected by the BIA and Circuit Courts for lacking "well-defined boundaries," and therefore the parties in those cases failed to prove membership in a particular social group. However, the BIA has stated that, "[n]evertheless, we emphasize that our holdings in *Matter of S-E-G-* and *Matter of E-A-G-* should not be read as a blanket rejection of all factual scenarios involving gangs." *Matter of M-E-V-G-*, 26 I&N Dec. at 251; *see also Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008); *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008). Those who merely resist gang recruitment may in some cases be seen as an "amorphous" category, however, the act of having been tortured by a gang for having resisted recruitment and involvement in criminal gang activities is a category with "well-defined boundaries" and social visibility. *Matter of S-E-G-*, 24 I&N Dec. at 582.

II. The proposed PSG is defined with particularity.